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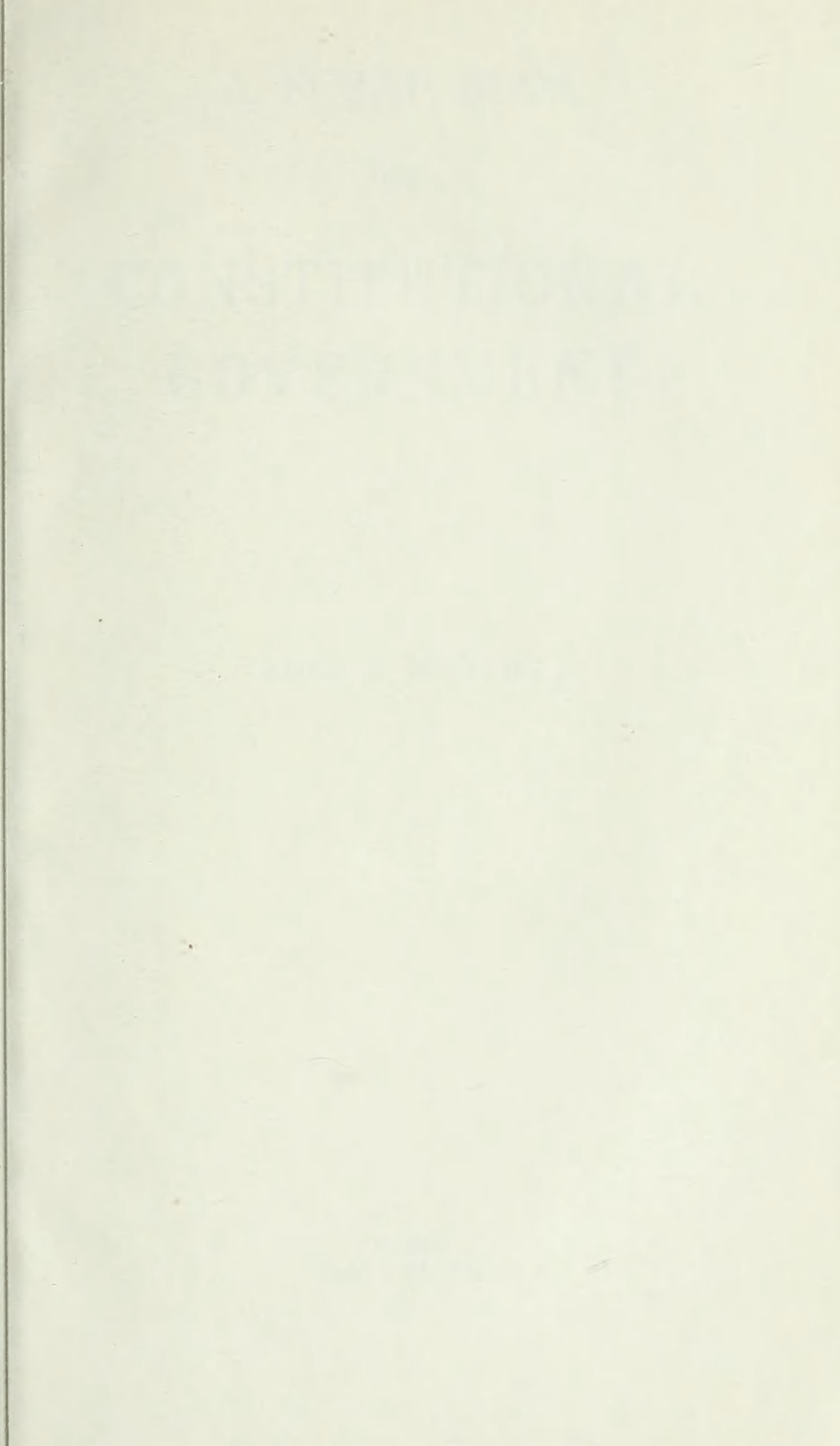
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A SCRAP BOOK  
ON  
CONSTITUTIONAL  
GOVERNMENT

BY  
JAMES J. MAYFIELD

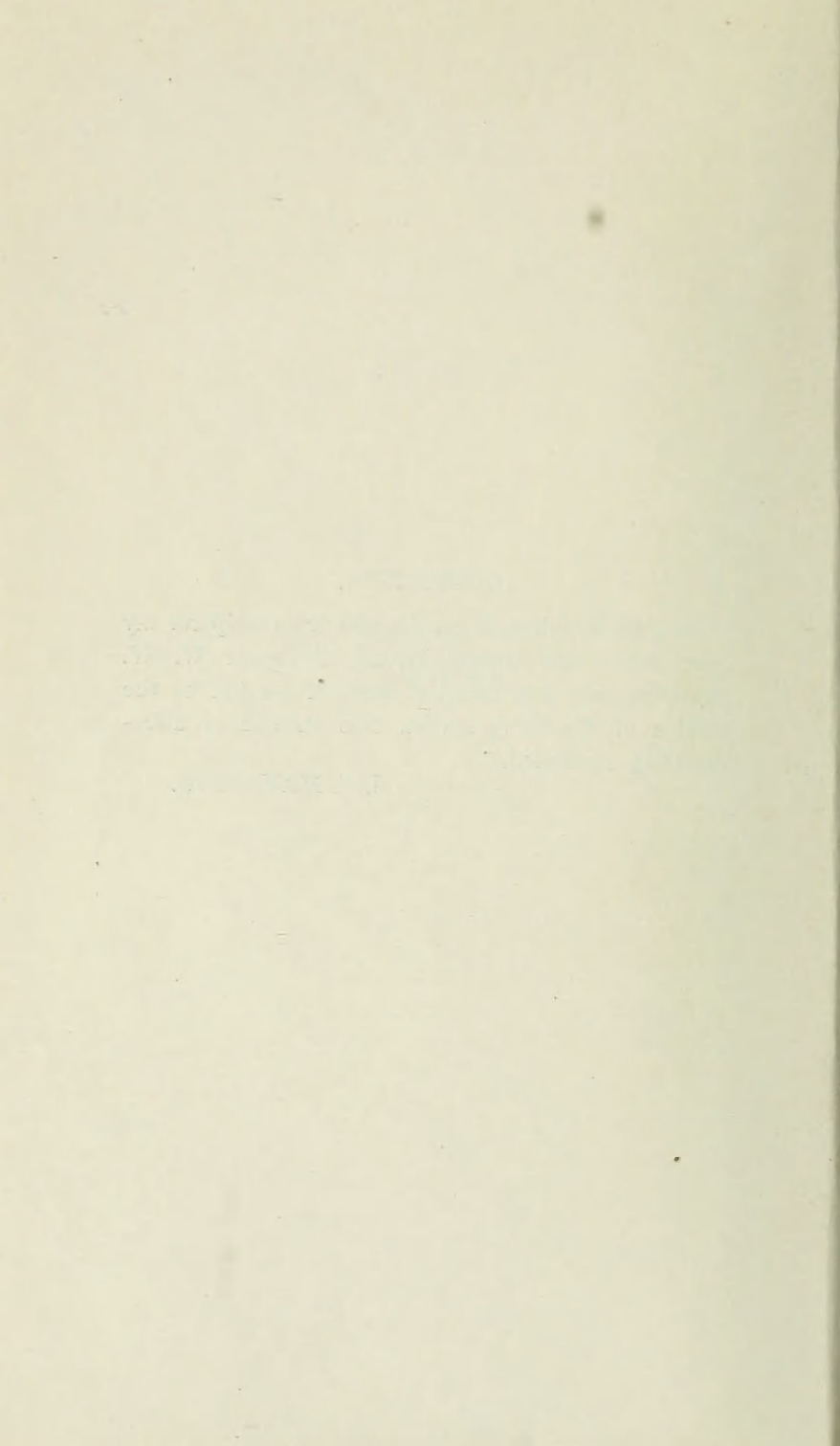
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BY  
J. J. MAYFIELD

### DEDICATION.

As a slight token of esteem and friendship for my true, tried and trusted friend, Governor W. W. Brandon, who has devoted most of his life to the service of his Government, this volume is affectionately dedicated.

J. J. MAYFIELD.





## PREFACE

If this compilation be of any value, or if it shall further thought upon the subject of Constitutional Government, and in the least aid those who desire to study the subject, I shall have then accomplished all that I sought, and hoped. In the language of the great American writer, jurist and lawyer, Judge Dillon, who ascribes the thought and words to an old English law-writer, "I shall then with the vanity of an author compare myself to one who travels over the dreary country, has picked up some plants, which he afterwards transplants to some delightful spot in a milder climate, where they may attract attention, even among more agreeable productions and specimens, by those who would never have noticed them in their native soil; and if they have any useful virtues, they will be welcome wherever they may be made to grow."

I have not attempted, except on rare occasions, to give my own ideas or words; but only to collect and arrange those of others, whom I conceive to be the best authority and who have spoken most to the point and who have used the most forceful language. In so far as practicable, I have attempted to give all phases of questions; have quoted from those who differed as to the objects and effects and as to the proper construction and meaning of various provisions of our Constitution. In these cases where there are extreme views on a given subject, I have quoted from those who entertained views midway between the two extremes. These as a rule, under the law of nature, will be found to be correct. The center of gravity is midway between the two extremes. The product of the means is equal to the product of the extremes. "There is a means in all things, beyond nor this side of which right cannot exist." Both extremes are errors. The antipode of error is not truth, but error still: truth is midway between them. That the makers of our Constitution and the founders of our government recognized this law of nature, and built and made accordingly is the reason we have the best government in the world. If in the future, we depart from this law of nature, and go to either extreme, we thereby destroy that feature of our government which makes it the best. One extreme leads to Monarchy, the other to Anarchy, midway between these two we stand and avoid both extremes. The fundamental principles of our government are eternal and im-

mutable; they are laws of nature; the rules for administering it are temporal and changeable,—they are laws of men and may be adjusted to meet changed conditions to which the eternal principles are to be applied.

The object and purpose of the book is not to declare new principles, or to make new arguments, never before made; not even to say or print anything not heretofore said or printed; but to place before the people, in one book, the best things said by the best writers and speakers on those subjects. To thus place before the readers the common-sense of the subjects in thought and the language of those whose character and reputations command the respect of the world.

The body and notes in the main are quotations and excerpts from the writings of those who made and proposed it, those who have been charged with the duty of construing and enforcing it, copious quotations from many text-books and commentators on the Constitution and Constitutional Government. Among the sources from which the quotations and excerpts are taken and to which references are made are the *Federalist*, the Decisions of the Supreme Court of the United States, Story, Cooley, Black, the Tuckers, Tiedman, Miller and Foster's books on Constitutional Law. The messages, writings and speeches of many of the Presidents, the speeches and writings of many of the United States Senators, such as Webster, Clay, Calhoun, Blaine, Hayne and others. There are quotations and excerpts from noted statesmen of America, England and France as to our Constitutional Government and various provisions of the Constitution, their sources, origin, object and purposes.

## INTRODUCTORY

The first parts of this book are intended to show the different stages by which British Government of America was transformed into American Written Constitutional Government. How Magna Charta was a bill of rights for the American Colonists. How the Declaration of Independence was a Declaration of Fundamental and Governmental Principles, and an indictment of King George, and his Parliament, for denying the Colonists their rights secured by the Great Charter and other English bills of rights. How the Colonies were transformed into State Governments. How the States were confederated to carry on the War of the Revolution. How the Articles of Confederation were transformed into the Constitution of the United States and how it created a dual form of Government. By these transformations, all the sovereign governmental powers of Great Britain which controlled the Colonies were thrown off by the Declaration of Independence, and the American Revolution. The Colonists were then free to form their own Governments, which they did.

This scrap-book is to show how they did it and the effect thereof. It shows how the people of each colony formed a separate State Government, giving to this State Government all the powers, except such as they reserved. How these States first confederated and how they later dissolved the Confederation and formed the United States Government. How and which of the powers were vested in the United States; and which were reserved to the State Governments and which retained by the people themselves with which they have never parted, and which consequently are not vested in any Government. How the powers granted to the State Government and the United States Government are again subdivided into legislative, judicial, and executive. How each department of Government is given a check upon both the other departments. How the Federal Government is given checks upon the State Governments. How each of the powers so distributed by, and reserved to the people, balances even against all the others. How the laws of these Governments so created is patterned after the laws of nature, so that the centrifugal and centripetal forces, each acting on the Government, causes it to go on in its intended orbit and course without collisions with other Governments. How the internal and external forces

each aids and tends to preserve the compound and dual Government so founded. How the destruction or disturbance of any of the forces, powers, or distribution thereof, may tend to wreck the whole.

The Colonists claimed the rights and privileges conferred or granted by Magna Charta as their birthright. The Declaration of Independence was largely an indictment of King George, and Parliament, for denying to the Colonists their rights and privileges, which other English subjects enjoyed by virtue of Magna Charta, and other bills of rights.

The Revolution was on account of being denied the rights and privileges which English laws accorded other English subjects, and not to acquire rights or privileges not enjoyed by other British subjects.

It is true that after the Revolution, when the Colonies became States, they did reserve to the Colonists, the individuals and their descendants, rights and privileges, not theretofore enjoyed by any people, or theretofore embodied in any bill of rights. They refused to grant to the government they thereby created, many of the powers theretofore considered governmental. The governments that each of these Colonies created for themselves, was created by a written Constitution or Charter, so that there might never be any doubt as to the powers granted to the government thereby created, nor as to those thereby reserved to the people or to the individuals who created the government. These grants, deeds, or charters, called State Constitutions, were new to the history of all the world. Theretofore, all such grants, charters, bills of rights, etc., in the nature of Constitutions, were made by Kings, Monarchs, Tyrants, Despots, or their Agents and Emissaries, to the people, or subjects. In those the government was always the grantor, and the people or the subjects, the grantees. All governmental power was not granted, and was never possessed by the States, the grantors expressly reserved unto each of themselves, individually, and their descendants, certain rights and privileges theretofore disregarded by Despotie governments, and even covenanted with the grantee, that it would ever warrant and defend those reserved rights and privileges, against the grantee of the government or any dependent thereof, and even against the people themselves. The government, therefore, was given no power to deny to or to deprive any one of the people of any one of these reserved rights or privileges, and it was required to see to it that none or all of the



people were deprived of any one of these reserved rights or privileges. The American Constitutions are unique in this respect, that they are in part an attempt of the people to protect themselves against the despotism of themselves. It was known to the makers of those Constitutions, as it is to all students of ancient and modern history, that the people themselves, sometimes became, for a time, the most cruel despots and tyrants, to all who did not agree with them. These provisions were, therefore, intended to have the government created, to protect the minority against the aggressions of the majority. Thus each Colony, excepting Rhode Island, threw off the British yoke, and formed a State government, under a written Constitution. This act on the part of the Colonies, being a revolution, was accepted as such by the British Crown, and an attempt was made to coerce them into submission to the will of the Crown. This resulted in the War of The Revolution. It was known and apparent to all that the war could not be carried on successfully, except by unity of action by all the Colonies. As there was unity of action in declaring the Colonies independent, there was need of unity of action to maintain the Declaration, and to establish Independence. To this end, Articles of Confederation were agreed upon, by and between the Colonies, by which a Confederated government was created, but without destroying the unity or independence of each of the States. By these Articles of Confederation, the war power of each State, was granted or conferred upon the Confederated Government. Likewise power to provide for and to create and control international and external affairs was conferred upon the Confederated government, but the power to control internal affairs, that is to maintain local self-government was retained, reserved and not granted. These powers granted to this Confederated government, were granted as a whole to a Congress, thereby created. There was no division of the governmental powers, and a grant to each of the divisions, as was done in the State Constitutions. and in the Federal Constitution, which revised, or was substituted for the Articles of Confederation. In fact, no attempt was made in the Articles of Confederation to grant Executive or Judicial powers or functions, but only Legislative powers were granted. This Congress of the Confederated Government could pass statutes, but every State construed and enforced them as it pleased. Any or all of the states could construe any Act as it pleased, hold it valid, and enforce it, as to its own

people, or hold it void, and decline to enforce it, or enforce it in part, or utterly fail to enforce it or to notice it without ever attempting to construe it. The Confederated government could levy taxes, but it could not collect them, unless the States saw fit to comply with the Statutes. The Confederated Government could make requisitions on the States for taxes or funds to support the government, and for soldiers and to carry on the War, but the States could obey in full or in part, or refuse entirely, and the Confederated Government, nor the other States could not compel observance.

The Confederated Government was found to be too weak, it was well described as a rope of sand. This weakness, with other faults, one of which gave the States the power to control commerce with other States, and foreign countries, led to the calling of a Convention of all the States to revise the Articles of Confederation. This convention resulted not only in a revision of the Articles, but in the proposal of a Constitution, modeled after the State Constitutions, which conferred on the Government to be created thereby, not only all the powers conferred on the Confederation, but many additional powers. It followed the State Constitution, in dividing all the powers to be granted into three classes, Legislative, Judicial and Executive. It granted these powers not to the government as a whole, but to the respective and appropriate departments of government, which it created, and provided that neither of the departments should encroach upon the powers granted to the others. This government thus created, was thereby not only given powers to make laws, but also to construe and to enforce them; the last two powers not being conferred on the Confederated Government. Nothing like all the governmental powers, possessed by the States which were possessed by the people after the Declaration of Independence, and before the formation of State Constitutions, and the Articles of Confederation were granted to the new government created by the Federal Constitution. Very few of these sovereign powers were thus granted. Only those relating to international, inter-state, or external affairs were thus granted. All those relating to purely local and internal affairs were retained by the States, and the people of the respective States. This was true from the very nature of things; that is, that the government to be created was one of granted powers, and which of necessity could possess no power or right, except such as passed by the grant. For fear, how-

ever, that there might be some mistake or misunderstanding as to this feature, the Tenth Amendment to the Constitution expressed this intent and reservation of rights and powers. In fact the first ten amendments were proposed by the first Congress, and adopted and ratified by the States, to prevent any claim or contention on the part of the Federal Government or its officers and agents, that the States had parted with any of the powers granted them by the people, except those specified in the grants of the Federal Constitution or necessarily inferred from those so expressly granted. These ten amendments were therefore intended to take the place of a Bill of Rights in the original Constitution, the omission therefrom being then agreed by a great majority of the people to have been a grievous fault of the original instrument. It is well authenticated by history that the original Constitution would not have been ratified by the States, but for the assurance given the people by the friends of the Constitution, by such men as Washington, Madison and Hamilton, that the Constitution would be cured of this serious defect, as soon as possible, by amendments to it, which was provided for by Article Five of the original.

The writer has heard of the following legend as to these amendments and their connection with or relation to the ratification of the Constitution. How much, if any, truth there may be in it, he does not know. That there were solid bases for the story which does no harm, but is a credit to the character and memories of all concerned, history does establish.

The story or legend, as the writer remembers it, runs something like this: Col. Hamilton being engaged with Madison and Jay in writing and having published the papers called *The Federalist* which were intended to secure the ratification of the proposed Constitution, by the people of the several States, by showing its virtues and pointing out the vices of the Articles of Confederation, for which it was to form a substitute, saw that it would fail of ratification by the requisite number of States, unless something was done quickly to satisfy the people, that it would be amended so as to contain a bill of rights, similar to those contained in the State Constitutions. Hamilton at one time had contended against the insertion of a bill of rights on the ground, however, that it was useless, and that as all the rights reserved to the States, and the people, could not be expressed that it might be contended that those not expressed were granted, applying the

rule "*Expressio Unius, exclusio alterius.*" This argument was answered by providing that this rule should not apply. Under these circumstances it is said that Col. Hamilton said to Gen. Washington, "The Constitution is going to fail of ratification, unless something is done quickly." Washington asked, "What can we do that we have not done, and are doing?" Col. Hamilton replied, "There is one man in the world who can save it, and there are two men in the world who can induce him to save it." Gen. Washington said: "You speak in enigmas, explain—what do you mean?" Col. Hamilton answered, "I mean that Thomas Jefferson can save it, and that George Washington and James Madison can induce him to save it, now get to work."

This is probably only legend or fiction, but it does illustrate a condition, and what was done, and the result. Washington and Madison did take up a correspondence with Mr. Jefferson, who was then Minister to France, and was there when the Constitution was formed, and proposed to the States for ratification. They each sent him copies of the proposed Constitution, and requested his criticism of it. They each by letter discussed with Mr. Jefferson its virtues and vices. Mr. Madison sent to Mr. Jefferson copies of the *Federalist*, written by Hamilton, Madison and Jay. Mr. Jefferson complained of the omission of a bill of rights, and at first was of the opinion that a new one should be drafted containing a bill of rights, similar to those in the Virginia Constitution, drafted by Mr. Mason. He subsequently became converted to the plan of adopting or ratifying it as it was under an agreement with its friends to amend in this respect as soon as practicable. Meetings of its friends were had to this end, and an agreement reached in accord with Mr. Jefferson's idea. These amendments, thirteen in number, were drafted by Mr. Madison and submitted to Mr. Jefferson, for suggestions. The amendments were proposed by the first Congress held under the Constitution, and ten of them were adopted as they now appear in the Constitution. Mr. Jefferson did write to many of his influential friends to support the ratification of the Constitution. The fact that it was known that Jefferson favored ratification no doubt had a wonderful influence on the people, and the delegates in many of the States in supporting the ratification. This much is shown by the correspondence of Jefferson, Washington and Madison. Many quotations from these letters will appear in subsequent pages of this book.



# A Scrap-book on Constitutional Government

## MAGNA CHARTA

The granting of this charter of charters of liberties is unquestionably among if not the greatest event in the history of English-speaking peoples. At the time this charter was granted, the people had no civil right other than custom and those the Kings allowed. There was no law other than custom and the will of the King. There was no law-making body, Parliament, Congress, Legislature, or Commission with or without the consent of the King. This charter is the fountain spring from which all branches, creeks, and rivers of English written constitutional law flows. At and prior to the date of the grant of this great charter war was the usual and then thought to be the natural condition among nations and races. The people bore its burdens, shared its glory, fought for their King, under the hope of rewards and protection by him. It was the laws of Edward that the Barons at Runnymede wished re-established; and which were in part done by the grants of Magna Charta.

Many of the rights embodied in Magna Charta were not created thereby, but merely restored those which had been lost. This is true as to the right of Jury Trial. The barons were the actors in the demands upon the King for the grants of rights acquired by Magna Charta; but the people were back of the barons and urged them to action, even against the orders of the Pope.

When Langdon was reading the proposed charter to the King, the latter complained of much of it; but, when the forty-ninth chapter, part two, was read the King was furious and swore by his favorite oath, which was by "God's teeth" that he would never grant it, and asked Langdon why they did not ask a grant of his throne. He said to Langdon that he was King and intended to remain King, and that his word was the only law, and that the barons nor the people had no right to ask such concessions, and that the request so to do was an insult.<sup>1</sup> The barons on receiving John's reply, organized an army, called the "Army of God and Holy Church" and marched upon London, May 24, 1215. The barons held several conferences with the King and by emissaries, Langdon and

<sup>1</sup>Barrington's Magna Charta, p. 149.

Pembroke. They met the King at Counsel Meadow called Runnymede, on June 15, 1215, and presented their demands to him in person, to which he acceded. Mr. Barrington says they could now have received much more had they demanded it; but the barons were honest, and wanted only what was right.<sup>1</sup> This was the first charter to be obtained by force from any English monarch. John did not actually sign the document. He sealed and granted it. "*Data per manum nostrum*" as was the custom of that time, the King herein speaks of himself as "We," and not "I" as other monarchs had done. The barons also demanded a covenant of the King that he would faithfully perform his part of the agreement, and to insure this, they demanded and obtained the custody of the Tower of London until the fifteenth of the following August. The Pope declined to accede to or ratify the charter, and issued a bull annulling it, and releasing the King and all who were sworn to observe it. John gladly accepted the Pope's declaration and agreed with the Pope that the charter was obtained by duress and coercion. The barons refused to accede to the Pope's declaration and he excommunicated them.

John and the Pope then raised another army and went to war against the barons and would have probably been victorious but for the fact that the barons made an alliance with Philip, the King of France, who headed his army to aid the barons on May 21, 1216, and was fast gaining victory when John died Oct. 19, 1216.<sup>2</sup> The poet thus described the time and death of the King:

"With John's foul deeds, England's whole realm is stinking,  
As doth Hell too, wherein he now is sinking."

In beginning his commentary on this chapter of Magna Charta, 2 Inst. 46, Coke says:

This chapter containeth nine several branches:

1. That no man be taken or imprisoned but *per legem terrae*, that is, by the *common law, statute law, or custom of England*; for the words *per legem terrae*, being towards the end of this chapter, does referre to all the precedent matters in the chapter, etc.

2. No man shall be discussed, etc., unless it be by the lawful judgment, that is, verdict of his equals, (that is of men of his own condition,) or *by the law of the land*, (*that is to speak it once for all*.) *by the due course and process of law*.<sup>3</sup>

<sup>1</sup>Barrington's Magna Charta, p. 151.

<sup>2</sup>Barrington's Magna Charta, p. 157.

<sup>3</sup>United States Reports, Vol. 110, p. 523.

The principal and true meaning of the phrase *due process* has never been more truly or accurately stated than by Mr. Justice Johnson, in *Bank of Columbus v. Oakley*, 4 Wheat., 235-244:

As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.<sup>1</sup>

There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best of ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

The concessions of Magna Charta were wrung from the King as guarantees against the oppressions and usurpations of his prerogative. It did not enter into the minds of the baron to provide security against their own body in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for withstanding what was attributed to Lord Coke in *Bonham's Case*, 8 Rep. 115, 118 a, the omnipotence of Parliament over the common law was absolute, even against the common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial. *United States Reports*, Vol. 110, pp. 531-2.

The phrase "due process of law" is not new in the constitutional history of this country or of England. It antedates the establishment of our institutions. Those who had been driven from the mother country by oppression and persecution brought with them, as their inheritance, which no government could rightfully impair or destroy, certain guaranties of the rights of life and liberty, and property, which had long been deemed fundamental in Anglo-Saxon institutions. In the Congress of the Colonies held in New York in 1765, it was declared that the colonies were entitled to all the essential rights, liberties, privileges, and immunities, confirmed by Magna Charta to the subjects of Great Britain. *Hutch. Hist. Mas. Bay*, Appendix F. "It was under the consciousness," says Story, "of the full possession of the rights, liberties, and immunities of British subjects, that the col-

<sup>1</sup>United States Reports, Vol. 110, p. 527.

onists in almost all the early legislation of their respective assemblies insisted upon a declaratory act, acknowledging and confirming them." 1 Story Const. Section 165. In his speech in the House of Lords, on the doctrine of taxation without representation, Lord Chatham maintained that the inhabitants of the colonies were entitled to all the rights and the peculiar privileges of Englishmen; that they were equally bound by the laws, and equally entitled to participate in the constitution of England. *United States Reports, Vol. 110, p. 539.*

Magna Charta—upon which rested the rights, liberties and immunities of our ancestors—was called, said Coke, "the Charter of the Liberties of the Kingdom, upon great reason, because *liberos facit*, it makes the people free." Hallam characterizes the signing of it as the most important event in English history, and declares that the instrument is still the keystone of English liberty. "To have produced it," said Mackintosh, "to have preserved it, to have matured it, constitute the immortal claim of England upon the esteem of mankind." By that instrument the King, representing the sovereignty of the nation, declared that "no freeman shall be taken, imprisoned, or be disseized of his freehold, liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we (not) pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land." *United States Reports, Vol. 110, p. 542.*

Erskine, in his speech delivered in 1784, in defense of the Dean of Asaph, said, in the presence of the judges of the King's Bench: "If a man were to commit a capital offense in the face of all the judges of England, their united authority could not put him upon his trial; they could file no complaint against him, even upon the records of the supreme criminal court, but could only commit him for safe custody, which is equally competent to every common justice of the peace. The grand jury alone could arraign him, and in their discretion might likewise finally discharge him, by throwing out the bill, with the names of all your lordships as witnesses on the back of it." *United States Reports, Vol. 110, p. 543.*

The royal governor of New York would not have had occasion to write in 1697 to the home government that the members of the provincial legislature were "big with the privileges of Englishmen and Magna Charta." 3 Bancroft, 56. Nor would the Colonial Congress of 1774, speaking for the people of twelve colonies, have permitted, as it did, the journal of their proceedings to be published with a medallion on the title page, "representing Magna Charta as the pedestal on which was raised the column and cap of liberty, supported by twelve hands, and containing the words '*Hanc Tuemur, Hac Nitimur.*'" Hurd on Habeas Corpus, 108. Anglo-Saxon liberty would, perhaps, have perished long before the adoption of our Constitution, had it been in the power of government to put the subject on trial for his life whenever a justice of the peace, holding his office at the will of the crown, should certify that he had committed a capital crime. That such officers are, in some of the States, elected by the people, does not add to the protection of the citizen; for, one of the peculiar benefits of the grand jury system, as it exists in this country and England, is that it is composed, as a general rule, of a body of private persons, *who do not hold office at the will of the government, or at the will of voters.* *United States Reports, Vol. 110, p. 554.*



## COPY OF THE GREAT CHARTER OF KING JOHN<sup>1</sup>

### I<sup>2</sup>

John, by the grace of God, King of England, to the archbishops, bishops, abbots, earls, barons, justices, foresters, sheriffs, provosts, ministers, and all his bailiffs and his lieges, greeting. Know ye, that we by the grace of God, and for the saving of our soul, and the souls of all our ancestors, and of our heirs, and for the honour of God, and the safety of holy church, and for the amendment of our government, by the advice of our honoured fathers, Stephen, archbishop of Canterbury, primate of all England, and cardinal of Rome; Henry, archbishop of Dublin, William, bishop of London, Peter, bishop of Winchester, Jocelin, bishop of Bath, Hugh, bishop of Lincoln, Walter, bishop of Worcester, William, bishop of Chester, Benedict, bishop of Rochester and master Pandulph, subdeacon of our Lord the apostle, and our friend brother Anner, master of the order of knights templars in England; and by the advice of our barons, William, earl marshal earl of Pembroke, William, earl of Salisbury, William, earl of Warren, William, earl of Arundel, Alan of Galloway, constable of Scotland, Warin Fitz-Gerard, Peter Fitz-Herbert, Thomas Basset, Alan Basset, Philip d'Aubenie, Robert de Ropelee, John Marshal, and John Fitz-Hugh, and by the advice of other lieges:

### II<sup>2</sup>

Have in the first place granted to God, and confirmed by this our present charter, for us and for our heirs forever, That the churches of England shall be free, and shall enjoy their rights and franchises entirely and fully: and this our people is, that it be observed, as may appear by our having granted, of our mere and free will, that elections should be free (which is reputed to be a very great and very necessary privilege of the churches of England) before the difference arose betwixt us and our barons, and by our having confirmed the fame by our lord the apostle Innocent the third. Which privilege we will maintain: and our will is, that the fame be faithfully maintained by our heirs forever.

### III<sup>2</sup>

We have also granted to all the freemen of our kingdom, for us and for our heirs forever all the liberties hereafter mentioned, to have and to hold to them and their heirs of us and our heirs. If any of our earls, our barons, or others that hold of us in chief by knight-service, die; and at the time of his death his heir be of full age, and relief be due, he shall have his inheritance by the ancient relief; to wit, the heir or heirs of an earl, for an entire earldom, C. pounds; the heir or heirs of a baron, for an entire barony, C. marks; the heirs or heirs of a knight, for a whole knight's fee, C. shillings at most; and where less is due, less shall be paid, according to the ancient customs of the several tenures.

<sup>1</sup>A true copy from the original French.

<sup>2</sup>This chapter was to free the church and religion from the control of the Crown.

<sup>2</sup>This chapter was to change the feudal law as to the proprietorship and succession of title to lands and real estate.

IV<sup>1</sup>

If the heirs of any such within and in ward, they shall have their inheritance when they come of age without relief, and without fine.

V<sup>2</sup>

The guardians of the land of such heirs being within age, shall take nothing out of the land of the heirs, but only the reasonable profits, reasonable customs, and reasonable services, and that without making destruction of waste of men or goods.

## VI

And if we shall have committed the custody of the land of such heir to a sheriff, or any other who is to account to us for the profits of the land, and that such committee make destruction or waste, we will take of him amends, and the land shall be committed to two lawful and good men of that fee, who shall account for the profits to us, or to such as we shall appoint.

## VII

And if we shall give or sell to any person, the custody of the lands of any such heir, and such donee or vendee make destruction or waste, he shall lose the custody, and it shall be committed to two lawful, sage, and good men, who shall account to us for the same, as aforesaid.

VIII<sup>3</sup>

And the guardian, whilst he was in custody of the heir's land, shall maintain the houses, ponds, parks, pools, mills, and other appurtenances to the land out of the profits of the land itself; and shall restore to the heir, when he shall be of full age, his land well flocked, with ploughs, barns, and the like, as it was when he received it, and as the profits will reasonably afford.

IX<sup>4</sup>

Heirs shall be married with disparagement; insomuch, that before the marriage be contracted, the persons that are next of kin to the heir, be made acquainted with it.

X<sup>5</sup>

A widow after the death of her husband, shall presently and without oppression, have her marriage and her inheritance; nor shall give anything for her marriage, nor for her dower, nor for her inheritance, which she and her husband were seized of the day of her husband's death: and she shall remain in her husband's house forty days after his death; within which time her dower shall be assigned her.

<sup>1</sup>This changed the law and custom as to the rights of heirs on becoming of age to get possession and control of their estates without the payments of fines.

<sup>2</sup>Chapters V, VI, and VII were to prevent the King from permitting or committing waste of the estates.

<sup>3</sup>This was to secure to the heir his inheritance without waste of implements necessary to cultivate it.

<sup>4</sup>This was to prevent destructions of estates in consequence of marriage and to promote marriages.

<sup>5</sup>To change the law that required the widow to go into mourning for one year after the death of her husband or protect her dower and quarantine rights.

XI<sup>1</sup>

No widow shall be compelled to marry if she be desirous to live single, provided she give security not to marry without our leave, if she hold of us, or without the lord's leave of whom she holds, if she hold of any other.

XII<sup>2</sup>

We nor our bailiffs will not seize the lands or rents of a debtor for any debt so long as his goods are sufficient to pay the debt; nor shall the pledges be distrained upon whilst the principal debtor have not wherewith to pay the debt, the pledges shall answer for it; and if they will, they shall have the lands and rents of the debtor till they have received the debt which they paid for him, if the principal debtor cannot show that he is quit against his pledges.

XIII<sup>3</sup>

If any persons have borrowed money of Jews, more or less, and die before they have paid the debt, the debt shall not grow whilst the heir is under age; and if such debt become due to us, we will take no more than the goods expressed in deed.

XIV<sup>4</sup>

And if any die, and owe a debt to the Jews, his wife shall have her dower, and shall be charged with no part of the debt; and if the children of the deceased person be within age, their reasonable estovers shall be provided them, according to the value of the estate which their ancestor had; and the debt shall be paid out of the residue, saving the services due to the lord. In like manner shall it be done in cases of debts owing to other persons that are not Jews.

XV<sup>5</sup>

We will impose no escuage nor aids within our realm, but by the common council of our realm, except for our ransom, and for the making our eldest son a knight, and for marrying our eldest daughter once; and for these purposes there shall be a reasonable aid required.

XVI<sup>6</sup>

In like manner shall it be done within the city of London: and moreover, the city of London shall have her ancient customs and liberties by land and water.

<sup>1</sup>To prevent the lords from compelling the widows to marry proffered spouses or to forfeit their estates, but it prevents her from marrying an enemy.

<sup>2</sup>This was to preserve the lands to the tenants and heirs: it has come down to us and is now the law in most States of the American Union.

<sup>3</sup>This chapter was to prevent usury by the Jews, the Christians being prevented from taking it by the laws of the church. It was also to preserve the lands for the widow and heirs.

<sup>4</sup>As a part of chapter X and wade to include all debts.

<sup>5</sup>Escuage was a tax on land or possessing rights thereto to be used exclusively for war purposes. This prohibited the tax without the consent of the great Council provided for in Magna Charter. It is said that no one of the three excepted cases were ever exercised.

<sup>6</sup>Chapters XVI and XVII supplement Chapter XII and modify it as to city's name, so that the tax could not be levied in London even with the consent of the Council.

## XVII

We will moreover and grant, that all other cities, and boroughs, and towns and ports, have, in all respects, their liberties and free customs.

XVIII<sup>1</sup>

And as for coming to the common council of the kingdom, and for assessing aids (except in the three cases aforesaid) and as for the assessing of escuage, we will cause to be summoned the archbishops, abbots, earls, and the greater baron, each in particular by our letters; and moreover, we will cause to be summoned in general, by sheriffs, and bailiffs, all that hold of us in chief, at a certain place; and in our said letters we will express the cause of the summons. And when the summons shall be so made, business shall go on at the day assigned, by the advice of such as are present, though all that are summoned do not appear.

XIX<sup>2</sup>

We will not allow for the future, that any take aid of his free-men, but only to ransom his person, to make his eldest son a knight, and to marry his eldest daughter once; and for these purposes there shall but a reasonable aid be given.

XX<sup>3</sup>

None shall be distrained to do greater service for a knight's fee, or for any other frank-tenement than what is due by his tenure.

XXI<sup>4</sup>

Common pleas shall not follow our court, but shall be held in a certain place.

XXII<sup>5</sup>

Recognizances of *novel disseisin*, *mordancstern* and *darrein presentment*, shall be taken nowhere but in their proper counties, and in this manner: We, or our chief justice (if ourselves be out of the realm) will send two justices through every county four times a year; who, with four knights of every county, to be chosen by one county, shall take the said assizes in the county, at a day when the county-court is held, and in a certain place; and if the said assizes cannot be taken upon that day, so many knights and free tenants of them that were present in the county-court that day, shall stay, as may give a good judgment, according as the concern may be greater or less.

<sup>1</sup>This provided for summoning the great council which was a kind of Embryonic Parliament.

<sup>2</sup>Little different from Chapter XII.

<sup>3</sup>This was to prevent execution against tenants by distringas or otherwise.

<sup>4</sup>To secure permanency and certainty as to places of trial.

<sup>5</sup>This fixed the venues or places for the trial of titles to land in the locality, district in which the land was situated. This has been followed in most all the States in the American Union. They were venue Statutes.



XXIII<sup>1</sup>

A freeman shall not be amerced for a little offence, but according to the manner of his offence; and for a great offence he shall be amerced according to the greatness of his offence, saving his contentment; and so a merchant saving his merchandize; and a villain in like manner shall be amerced saving his wainage, if he fall into our mercy; and none of the said ameracements shall be affected, but by oath of good and lawful men of the vicinage.

## XXIV

An earl and a baron shall not be amerced but by their peers, and according to the manner of their offence.

## XXV

No clerk shall be amerced but according to his lar-fee, and in like manner as others aforesaid, and not according to the quantity of his church-living.

XXVI<sup>2</sup>

No ville nor any man shall be distrained to make bridges over rivers, but where they antiently have, and of right, ought to make them.

XXVII<sup>3</sup>

No sheriffs, constables, coroners, nor other our bailiffs, shall hold the pleas of our crown.

XXVIII<sup>4</sup>

All counties, hundreds, wapentakes and tithings, shall be at the antient farms without being raised, except our own demense manners

XXIX<sup>5</sup>

If any that holds of us a lay-fee die, and our sheriffs, or other our bailiffs shew our letters patents of summons for a debt which the deceased owed to us, our sheriff or bailiff may well attach and inventory the goods of the dead, which shall be found upon his lay-fee, to the value of the debt which the deceased owed to us, by the view of lawful men, yet so as nothing be removed till such time as the debt, which shall be found to be due to us, be paid; and the residue shall go to the executors to perform the testament of the dead; and if nothing be owing to us, all his goods shall go to the use of the dead, saving to his wife and children their reasonable parts.

<sup>1</sup>Chapters XXIII, XIV and XXV were to prevent excessive fines and punishments and to create a kind of exemptions, or bankruptcy, to prevent pauperism, by saving the laborer a part of his effects from his creditors to his family and dependents. The purposes or doctrine have come down to us in the forms of bills of rights against excessive fines and punishments, insolvency, exemptions, and bankruptcy bills.

<sup>2</sup>To prevent taxations of municipalities and large land holders for the purposes of erecting bridges, fortifications, bullwarks, etc. These taxes had been used against the barons to success in their wars against the Crown. They have sought to limit

the expeditions against invasions of foreign foes and then by will of the Council only.

<sup>3</sup>This was to separate Executive and Judicial power and to secure judges, learned in law.

<sup>4</sup>This was to regulate the classification of cities, towns, counties, or municipalities or other divisions wherein vested title in respective localities to the King, prelates, or nobles, and to prevent the extortion of rents in certain classes mentioned.

<sup>5</sup>This regulated and changed the right of decedents to dispose of their lands. At the date of the charter a decedent could not dispose of more than one-third of his estate by will.

XXX<sup>1</sup>

If any freeman die intestate, his goods shall be divided by the hands of his near kindred and friends by the view of holy church, saving to every one their debts which the dead owed them.

XXXI<sup>2</sup>

None of our constables, nor other our bailiffs shall take the corn, nor the other goods of any person without paying for the same presently, unless he have time given him by consent of the vendor.

XXXII<sup>3</sup>

Our constables shall distrain no men who holds by knight-service, to give money for castle-guard, if he has performed it himself in proper person, or by another good man, if he could not perform it himself for some reasonable cause; and if we lead him, or send him into the army, he shall be discharged of castle-guard for so long time as he shall be with us in the army.

XXXIII<sup>4</sup>

Our sheriffs, our bailiffs, or others, shall not take the horses, nor carts of any freeman to make carriage, but by leave of such freeman.

XXXIV<sup>5</sup>

Neither ourselves nor our bailiffs shall take another's wood for our castles, or other occasions, but by his leave whose wood it is.

XXXV<sup>6</sup>

We will hold the lands of such as shall be convicted of felony but a year and a day, and then we will restore them to the lords of the fees.

XXXVI<sup>7</sup>

All wears shall, from this time forward, be wholly taken away in Thames and Medway, and throughout all England, except upon the seacoast.

<sup>1</sup>This provided for the distribution of estate in case of intestacy, that is no will, before the charter, or at least at one period, when the whole estate went to the chief lord, as it was forfeited to the Crown in case of suicide. Hence, the old saying that one had as well suicide as to die intestate. So many died in battle, however, that the bishops wanted to change the law so that the church might get its tenth part.

<sup>2</sup>This was to prevent excessive levies and sales of property for payment of castle guards against tenants. The duty of guarding the castle could not then be delegated by the tenant, and if he was absent, his estate was seized by the King's agencies.

<sup>3</sup>This allowed the tenant to perform and discharge the duty of castle guard by a deputy or agency.

<sup>4</sup>Explains itself.

<sup>5</sup>Explains itself.

<sup>6</sup>A felony then was a crime punished by death and there were hundreds of them, compared with a few as now, and this chapter was to relieve the forfeiture of the estates of felons from being absolute.

<sup>7</sup>This was to remove obstructions from the rivers so the people could use the streams to obtain wood and allow the fish to escape and be preserved for the people.

XXXVII<sup>1</sup>

The writ called Precipe henceforth shall be made to none out of any tenement, whereby a freeman may lose his court.

XXXVIII<sup>2</sup>

One measure of wine shall be used throughout our kingdom, and one measure of ale, and one measure of corn, to wit, the London quart. And there shall be one breadth of dyed cloths, russets, and haubergs, to wit, two ells within the lists: and concerning weights, it shall be in like manner as of measures.

XXXIX<sup>3</sup>

Nothing shall be given or taken henceforth for a writ of inquisition of life or member, but it shall be granted freely and shall not be denied.

XL<sup>4</sup>

If any hold of us by fee-farm, or by foccage, and hold likewise land of others by knight-service, we will not have the custody of the heir, nor of the land which is of the fee of another, by reason of such fee-farm, foccage, or burgage unless such fee-farm owe knight-service.

## XLI

We will not have the wardship of the heir, nor of the land of any person, which he holds of another by knight-service, by reason of any petit serjeantry by which he holds of us, as by the service of giving us arrows, knives, or such like.

XLII<sup>5</sup>

No bailiff for the time to come shall put any man to his law upon his bare word, without good witnesses produced.

XLIII<sup>6</sup>

No freeman shall be taken, nor imprisoned, nor disseized, nor outlawed, nor exiled, nor destroyed, in any manner; nor will we pass upon him, nor condemn him, but by the lawful judgment of his peers, or by the law of the land.

XLIV<sup>7</sup>

We will sell to none, we will deny nor delay to none the right and justice.

<sup>1</sup>This was to control the legal effect of this Judicial writ, and to thus avoid the loss of title without proper notice.

<sup>2</sup>To establish a uniform system of weights and measures to prevent cheats and swindles. This was followed in the Federal Constitution. Art. I, Sec. 8, Cl. 5.

<sup>3</sup>To prevent unreasonable confinement to secure speedy trials. The prototypes of our bills of rights, as, the rights of Habeas Corpus, and other rights of personal liberty.

<sup>4</sup>To prevent the King from claiming profits of certain lands held by certain tenants.

<sup>5</sup>This and the two following chapters provided for certain rights as to jury trials to prevent unreasonable arrests and are the prototypes of American Bills of Rights on the subject. Putting one to his law was putting him to his oath. These three sections were intended to put an end to the custom of a man having to buy his justice from the King. See the 4th, 5th and 6th amendments to the Federal Constitution.

<sup>6</sup>See note to XLII.

<sup>7</sup>See note to XLII.

XLV<sup>1</sup>

All merchants may, with safety and security, go out of England, and come into England, and stay, and pass through England by land and water, to buy and sell without any evil tolls, paying the antient and rightful duties, except in time of war; and then they that are of the country with whom we are at war, and are found here at the beginning of the war, shall be attached, but without injury to their bodies or goods, till it be known to us or to our chief-justice, how our merchants are entreated which are found in our enemies' country; and if ours be safe there, they shall be safe in our hand.

XLVI<sup>2</sup>

It shall be lawful for all men in time to come to go out of our kingdom, and to return safely and securely by land and by water, saving their faith due to us, except it be in time of war for some short time for the profit of the realm. But out of this article are excepted persons in prison, persons out-lawed, according to the law of the land, and persons of the country with whom we are at war. Concerning merchants what is above said shall hold as to them.

XLVII<sup>3</sup>

If any hold of any escheat, as of the honour of Wallingford, Nottingham, Boloin, Lancaster, or of other escheats which are in our hand, and are baronies, and die, his heirs shall owe to us no other relief, nor do us any other service, than was due to the baron of such barony when it was in his hand; and we will hold the fame in like manner as the baron held it.

XLVIII<sup>4</sup>

Men that dwell out of the forest shall not appear before our justices of the forest by common summons, unless they be in suit themselves, or bail for others who are attached for the forest.

XLIX<sup>5</sup>

We will not make sheriffs, justices, nor bailiffs, but of such as know the law of the land, and will keep it.

L<sup>6</sup>

All that have founded abbies, whereof they have charters from the Kings of England, or antient tenure, shall have the custody thereof whilst they are vacant, as they ought to have.

<sup>1</sup>This was to allow foreign merchants to visit England, to promote International commerce, and to repeal the edicts of the King which had prevented such commerce.

<sup>2</sup>This was to allow subjects to leave the realm, except in war, to promote commerce, and friendly relations with other nations.

<sup>3</sup>The word "Honour" as used here means a more exalted lordship, and to give relief to those classes.

<sup>4</sup>Later there were many charters relating to forests exclusively.

<sup>5</sup>Prior to the charter, lawyers were ecclesiastics. William, the Conqueror, however, fell out with the clergy and removed many of them. Later there sprang up a class of lawyers of ability such as Glanville. It was only after laws multiplied and became technical, that it required trained lawyers, as a profession. Hence this clause in the Charter.

<sup>6</sup>The barons having furnished the abbeys, they were determined that the King should not have the use of rent thereof, as John was doing.

LI<sup>1</sup>

All the forests that have been afforested in our time, shall instantly be disafforested; in like manner be it of rivers, that in our time and by us have been put in defence.

LII<sup>2</sup>

All evil customs of forests and warrants, and of forests and warraners, of sheriffs and their ministers, of rivers and guarding them, shall forthwith be inquired of in every county by twelve knights sworn of the same county, who must be chosen by the good men of the same county. And within forty days after they have made such inquisition, the said evil customs shall be utterly abolished by those same knights, so as never to be revived; provided they be first made known to us, or to our chief justice if we be out of the realm.

LIII<sup>3</sup>

We will, forthwith, restore all the hostages, and all the deeds which have been delivered to us by the English, for surety of the peace, or faithful service.

LIV<sup>4</sup>

We will wholly put out of bailiffwicks, the kindred of Gerard de Aties, so that from henceforth they shall not have a bailiffwick in England; and Engeland de Cigoigni, Peron, Guyon, Andrew de Chan-ceas, Gyon de Cygoigni, Geffry de Martigni and his brothers, Philip, Mark and his brothers, Geffry his nephew, and all their train. And presently after the peace shall be performed, we will put out of the realm all knights, foreigners, slingers, serjeants and soldiers, who came with horse or arms to the nuisance of the realm.

LV<sup>5</sup>

If any be disseized or esloined by us, without lawful judgment of his peers, of lands, chattels, franchises, or of any right, we will, forthwith restore the same; and if any difference arise upon it, it shall be determined by the judgment of the five and twenty barons, of whom mention is made hereafter in the security of the peace.

LVI<sup>6</sup>

As to all things whereof any have been disseized, or esloined without lawful judgment of their peers, by King Henry, our father, or by King Richard our brother, which we have in our hands, or which any other has, to whom we are bound to warrant the same, we will have

<sup>1</sup>This was to restore the lands which the King had wrongfully taken to increase his forests.

<sup>2</sup>This was to rid the forests of the evil customs and laws which had grown up as to them, to fix their boundaries and preserve them.

<sup>3</sup>This was to require the surrender of the sons and nephews of the barons whom John held as hostages.

<sup>4</sup>These people were hired soldiers whom John had imported to enforce

his laws. History does not certainly inform us the reason for the barons demanding the removal of these people.

<sup>5</sup>This brought the restoration of the barons the land which the King had wrongfully taken from them in his wars with them. The land which he held from his predecessors he was to hold under certain conditions.

<sup>6</sup>See note to LV.



respice to the common term of them that are crossed for the holy land, except such things for which suits are commenced, or inquest by our order before we took upon us the cross. And if we return from the pilgrimage, or perhaps forbear going, we will do full right therein. The same respice we will have, and the same right we will do in manner aforesaid, as to the disafforesting of forests, or letting them remain forests, which the Kings, Henry our father, or Richard our brother have afforested; and as to the custodies of lands which are of the fee of other persons, which we have held till now by reason of other men's fees, who held of us by knight-service; and of abbies that are founded in other men's fees, in which the lords of the fees claim a right; and when we shall be returned from our pilgrimage, or if we forbear going, we will immediately do full right to all that shall complain.

LVII<sup>1</sup>

None shall be taken nor imprisoned upon the appeal of a woman, for the death of any other than her husband.

LVIII<sup>2</sup>

All the fines and all the ameracements that are imposed for our use, wrongfully and contrary to the law of the land, shall be pardoned; or else they shall be determined by the judgment of the five and twenty barons, of whom hereafter, or by the judgment of the greater number of them that shall be present, or before Stephen, archbishop of Canterbury, if he can be there, and those that he shall call to him; and if he cannot be present, matters shall proceed, notwithstanding, without him; so always, that if one or more of the said five and twenty barons be concerned in any such complaint, they shall not give judgment thereupon, but others chosen and sworn shall be put in their room to act in their stead, by the residue of the five and twenty barons.

LIX<sup>3</sup>

If we have disseized or esloined any Welchmen of land, franchises, or of other things, without lawful judgment of their peers, in England or in Wales, they shall, forthwith, be restored unto them; and if suits arise thereupon, right shall be done them in the Marches by the judgment of their peers; of English tenements according to the law of England, and of tenements in Wales according to the law of Wales; and tenements in the Marches according to the law of the Marches; and in like manner shall the Welch do to us and our subjects.

<sup>1</sup>The widow had a right of action against any one who wrongfully killed her husband; it was in the nature of a civil action to recover damages. Such rights or actions are now given to the next of kin of deceased, but most frequently to his personal representative for the benefit of his descendants. If the widow fall in her action, it was a bar to a crimi-

nal prosecution. This is not so under our American statutes.

<sup>2</sup>This was to restore or compensate for taxes, fines, etc., collected from the barons for the purpose of carrying on war against them.

<sup>3</sup>This was to restore to the Welchmen the lands wrongfully seized from them.

LX<sup>1</sup>

As for all such things, whereof any Welchmen have been disseized or esloined, without lawful judgment of their peers, by King Henry our father, or by King Richard our brother, which we have in our hands, or which any others have, to whom we are bound to warrant the same, we will have respite till the common term be expired of all that crossed themselves for the Holy Land, those things excepted whereupon suits were commenced, or inquests taken by our order before we took upon us the cross; and when we shall return from our pilgrimage or if, peradventure, we forbear going, we will presently cause full right to be done therein, according to the laws of Wales, and before the said parties.

LXI<sup>2</sup>

We will forthwith restore the son of Lewelyn, and all the hostages of Wales, and the deed that have been delivered to us for security of the peace.

LXII<sup>3</sup>

We will deal with Alexander, King of Scotland, as to the restoring him his suitors and his hostages, his franchises and rights, as we do with our other barons of England, unless it ought to be otherwise by virtue of the charters which we have of his father William, late King of Scotland; and this is to be by the judgment of his peers in our court.

LXIII<sup>4</sup>

All these customs and franchises aforesaid, which we have granted to be kept in our kingdom, so far forth as we are concerned, towards our men, all persons of the kingdom, clerks and lay, must observe for their parts towards their men.

LXIV<sup>5</sup>

And, whereas, we have granted all these things for God's sake, and for the amendment of our government, and for the better compromising the discord arisen betwixt us and our barons: we, willing that the same be firmly held and established forever, do make and grant to our barons the security underwritten; to wit, That the barons shall chuse five and twenty barons of the Realm, whom they list, who shall, to their utmost power, keep and hold, and cause to be kept, the peace and liberties which we have granted and confirmed by this our present charter; insomuch, that if we, or our justice, or our bailiff, or any of our ministers, act contrary to the same in anything, against any persons, or offend against any article in this peace and security, and such our miscarriage be shewn to four barons of the said five

<sup>1</sup>This related to lands taken by John's predecessors, Henry II and Richard I.

<sup>2</sup>This is self-explanatory.

<sup>3</sup>These were wrongfully held by John as hostages and this chapter was to procure their surrender and freedom.

<sup>4</sup>This required the barons to observe the golden rule, to do unto their tenants and vassals as they required John to do unto them.

<sup>5</sup>Chapters LXIV, LXV, LXVI, LXVII and LXVIII provide for a council, the prototype of Parliament, whose duty was to see that the charter was enforced.

and twenty, those four barons shall come to us, or to our justice, if we be out of the realm, and shew us our miscarriage, and require us to amend the same without delay; and if we do not amend it, or if we be out of the realm, our justice do not amend it within forty days after the same is shewn to us, or to our justice if we be out of the realm, *then the four barons shall report the same to the residue of the said five and twenty barons; and then those five and twenty barons, with the commonalty of England, may distress us by all the ways they can: to wit, by seizing on our castles, lands, and possessions, and by what other means they can, till it be amended, as they shall adjudge; saving our own person, the person of our Queen, and the persons of our children:* and when it is amended, they shall be subject to us as before. And whoever of the realms will, may swear, that for the performance of these things he will obey the commands of the said five and twenty barons, and that, together with them, he will distress us to his power; and we will give public and free leave to swear to all that will swear, and will never hinder any one; and for all persons of the realm, that of their own accord will swear to the said five and twenty barons to distress us, we will issue our precept, commanding them to swear as aforesaid.

## LXV

And if any of the said five and twenty barons die, or go out of the realm, or be any way hindered from acting as aforesaid, the residue of the said five and twenty barons shall chuse another in his room, according to their discretion, who shall swear as the others do.

## LXVI

And as to all things which the said five and twenty barons are to do, if, peradventure, they be not present, or cannot agree, or in case any of those that are summoned cannot or will not come, whatever shall be determined by the greater number of them that are present, shall be good and valid, as if all had been present.

## LXVII

And the said five and twenty barons shall swear that they will faithfully observe all the matters aforesaid, and cause them to be observed to their power.

## LXVIII

And we will not obtain of any for ourselves, or for any other, anything whereby any of these concessions, or of these liberties may be revoked or annihilated; and if any such thing be obtained, it shall be null and void, nor shall ever be made use of by ourselves or any other.

LXIX<sup>1</sup>

And all ill-will, disdain, and rancour, which has been between us and our subjects of the clergy and laity since the said discord began, we do fully release and pardon to them all. And moreover, all tres-

<sup>1</sup>This was a full and complete pardon of all who had engaged in war or any acts of hostility against the Crown.



passes that have been committed by the occasion of the said discord since Easter, in the sixteenth of our reign, to the restoring of the peace, we have fully released to all clerks and laymen; and so far as in us lies we have fully pardoned them: And further, we have caused letters patent to be made to them in testimony hereof, witnessed by Stephen, archbishop of Canterbury, Henry, archbishop of Dublin, and by the aforesaid bishops, and by Mr. Pandulphus, upon this security and these concessions. Whereby, we will and strictly command, that the church of England be free, and enjoy all the said liberties, and rights, and grants, well and in peace, freely and quietly, fully and entirely to them and their heirs, in all things, in all places, and forever as aforesaid. And we and our barons have sworn that all things above written, shall be kept on our parts, in good faith, without ill design. The witnesses are the persons above-named and many others.

## LXX

This charter was given at the meadow called Running-Mead, betwixt Windsor and Stanes, the fifteenth day of June, in the seventeenth year of our reign.

JOHN, by the grace of God, King of England, to the sheriff of Hampshire, and to the twelve that are chosen in that county, to enquire of, and put away, the evil customs of the sheriffs, and of their ministers, of forests and foresters, of warrens and warreners, or rivers, and of guarding them, greeting. We command you, that without delay, you seize into our hand, the lands and tenements, and the goods of all those of the county of Southampton, that will not swear to the said five and twenty barons, according to the form expressed in our charter of liberties, or to such as they shall swear presently, at the end of fifteen days after their lands, and tenements, and chattels are seized into our hands, that ye sell all their goods, and keep safely the money that shall receive for the same, to be employed for the relief of the holy land of Jerusalem; and that ye keep their lands and tenements in our hands till they have sworn, or that Stephen, archbishop of Canterbury, and the barons of our kingdom have given judgment thereupon. In witness whereof, we direct unto you these our letters patent. Witness ourself: at Odibaam, the seven and twentieth day of June, in the seventeenth year of our reign.

## THE COLONIES

The American Colonies were mere corporations, created by kings, subject to visitatorial power, exercised through the Privy Council, and Courts, to dissolve them for breaches of charter rights. The thirteen, which formed the United States, were divided by historians into three classes, Charter, Crown and Proprietary. *Foster on the Constitution, Vol. 1, p. 311.*

Previous to the War of Independence, the Thirteen political communities which afterward became the original states of the American Union were colonies of Great Britain. Three forms of government obtained in the colonies: (a) Provincial. (b) Proprietary. (c) Charter. *Black on Constitutional Law, 34.*

The government of the colonies had always been treated as a part of the crown's prerogative with which Parliament did not interfere, except in so far as the regulation of commerce was concerned. The colonial lawyers claimed that the Stamp Act was not binding, as an infringement of the prerogative; while they stirred up the people with the cry that taxation without representation was tyranny.

The colonists were accustomed to having the statutes passed by their legislatures set aside as in conflict with a fundamental law. Their legislative powers were limited by their charters, which, like those of municipal or private corporations, permitted no legislation in conflict with the principles of the common law. Bills which they passed affecting private rights as well as the crown's prerogative were always subject to the disapproval of the Privy Council, which usually acted in accordance with the opinions grounded upon legal precedents written by the law-officers of the crown. *Foster on the Constitution, Vol. 1. p. 32.*

### Union of the Colonies

The British colonies never constituted one people. Judge Story, in his "Commentaries" on the Constitution, seems to imply the contrary, though he shrinks from a direct assertion of it, and clouds the subject by a confusion of terms. He says: "Now, it is apparent that none of the colonies before the Revolution were, in the most large and general sense, independent or sovereign communities. They were all originally settled under and subjected to the British Crown." And then he proceeds to show that they were, in their colonial condition, not *sovereign*—a proposition which nobody disputed. As colonies, they had no claim, and made no pretension, to sovereignty. They were subject to the British Crown, unless, like the Plymouth colony, "a law unto themselves," but they were *independent of each other*—the only point which has any bearing upon their subsequent relations. There was no other bond between them than that of their common allegiance to the Government of the mother-country. As an illustration of this may be cited the historical fact that, when John Stark, of Bennington memory, was before the Revolution engaged in a hunting expedition in the Indian country, he was captured by the savages and

brought to Albany, in the colony of New York, for a ransom; but, inasmuch as he belonged to New Hampshire, the government of New York took no action for his release. *Davis on The Rise and Fall of The Confederate Government, Vol. 1, p. 115.*

Another citation of Mr. Everett is from the first sentence of the Declaration of Independence: "When in the course of human events it becomes necessary for *one people* to dissolve the political bands which have connected them with another," etc., etc. This, he says, characterizes "the good people of the colonies as 'one people.'"

Plainly, it does no such thing. The misconception is so palpable as scarcely to admit of serious answer. The Declaration of Independence opens with a general proposition. "One people" is equivalent to saying "*any people.*" The use of the correlatives "one" and "another" was the simple and natural way of stating this general proposition. *Davis on The Rise and Fall of The Confederate Government, Vol. 1, p. 118.*

President Monroe, in one of his messages to Congress, gives a history of colonial government and how it passed into state governments, and shows, that even then it was separate and distinct. *Messages of Presidents, Vol. 2, p. 144.*

It was as "*United States*"—not as a state, or united people—that these colonies—still distinct and politically independent of each other—asserted and achieved their independence of the mother country. As "*United States*" they adopted the Articles of Confederation, in which the separate sovereignty, freedom, and independence of each distinctly asserted. They were "*United States*" when Great Britain acknowledged the absolute freedom and independence of each, distinctly and separately recognized by name. France and Spain were parties to the same treaty, and the French and Spanish idioms still express and perpetuate, more exactly than the English, the true idea intended to be embodied in the title—*les Estats Unis, or los Estados Unidos*—the States United.

It was without any change of title—still as "*United States*"—without any sacrifice of individuality—without any compromise of sovereignty—that the same parties entered into a new and amended compact with one another under the present Constitution. Larger and more varied powers were conferred upon the common Government for the purpose of insuring "a more perfect union"—not for that of destroying or impairing the integrity of the contracting members. *Davis on The Rise and Fall of The Confederate Government, Vol. 1, p. 118-9.*

## Relations of Colonies to Each Other and Their Mother Country

Bound by a common allegiance and absolutely controlled in their exterior relations by the mother country, the colonies before the Revolution were yet as regards each other practically independent, that is, distinct one from the other. Their common intercourse more or less frequent, the contiguity of their boundaries, their conflicting claims in many instances of authority over undefined and outlying territory, of necessity brought about conflicting contentions between

them. As these contentions became more and more irritating, if not seriously acute, the necessity for the creation of some means of settling them became more and more urgent if physical conflict was to be avoided. And for this reason, it is to be assumed, it early came to pass that differences between the colonies were taken to the Privy Council for settlement and were there considered and passed upon during a long period of years, the sanction afforded to the conclusions of that body being the entire power of the realm, whether exerted through the medium of a royal decree or legislation by Parliament. This power, it is undoubtedly true, was principally called into play in cases of disputed boundary, but that it was applied also to the complaint of an individual against a colony concerning the wrongful possession of property by the colony alleged to belong to him is not disputed. This general situation as to the disputes between the colonies and the power to dispose of them by the Privy Council was stated in *Rhode Island v. Massachusetts*, 12 Pet. 657, 739, 9 L. Ed. 1233, et seq., and will be found reviewed in the authorities referred to in the margin.

When the Revolution came and the relations with the mother country were served indisputably, controversies between some of the colonies of the greatest moment to them had been submitted to the Privy Council and were undetermined. The necessity for their consideration and solution was obviously not obscured by the struggle for independence which ensued, for, by the ninth of the Articles of Confederation an attempt to provide for them as well as for future controversies was made. Without going into detail it suffices to say that that article in express terms declared the Congress to be the final arbiter of controversies between the states and provided machinery for bringing into play a tribunal which had power to decide the same. That these powers were exerted concerning controversies between the states of the most serious character again cannot be disputed. But the mechanism devised for their solution proved unavailing because of a want of power in Congress to enforce the findings of the body charged with their solution, a deficiency of power which was generic because resulting from the limited authority over the states conferred by the Articles of Confederation on Congress as to every subject. That this absence of power to control the governmental attributes of the states for the purpose of enforcing findings concerning disputes between them gave rise to the most serious consequences and brought the states to the very verge of physical struggle and resulted in the shedding of blood and would, if it had not been for the adoption of the Constitution of the United States, it may be reasonably assumed, have rendered nugatory the great results of the Revolution, is known to all and will be found stated in the authoritative works on the history of the time. *38 Sup. Ct. Rept. No. 14, p. 404, May 15, 1918.*

### **The Continental Congress and the Articles of Confederation**

The first positive step towards the Union was the formation of the Continental Congress, a revolutionary body, which inaugurated the



war, declared the independence of the colonies, and drafted certain articles of confederation. Upon the ratification of these articles by the states, the United States of America came into being. *Black on Constitutional Law*, 36.

### Colonial Government

In all the colonies the people claimed the right to enjoy all the liberties, privileges, and immunities of British subjects, including those safeguards against royal or governmental oppression which had been gradually evolved in the course of English history, and the benefit of the common law, in so far as the same was applicable to their needs and their situation. They also claimed that, for all purposes of domestic and internal regulation, their own legislatures possessed entire and exclusive authority. In all matters of this sort, it was strenuously denied that parliament possessed the power to legislate directly for the colonies. England's financial straits having forced her to attempt the levy and collection of taxes in the colonies, by act of parliament without the concurrence of the local legislatures, the power to tax the people without representation on their part was stoutly resisted and denied, and this was one of the causes which led to the revolt of the colonies. *Black on Constitutional Laws*, 35.

The State Constitutions are the oldest things in the political history of America, for they are the continuations and representatives of the royal colonial charters, whereby the earliest English settlements in America were created, and under which their several local governments were established, subject to the authority of the English Crown and ultimately of the British Parliament. *Bryce's American Commonwealth*, Vol. 1, p. 413.

When, in 1776, the thirteen colonies threw off their alliance to King George III, and declared themselves independent States, the colonial charter naturally became the State Constitution. In most cases it was remodelled, with large alterations, by the revolting colony. But in three States it was maintained unchanged, except, of course, so far as Crown authority was concerned, viz: in Massachusetts till 1780, in Connecticut till 1818, and in Rhode Island till 1842. The other twenty-five States admitted to the Union in addition to the original thirteen, have all entered it as organized self-governing communities, with their Constitutions already made by their respective peoples. Each Act of Congress which admits a new State admits it as a subsisting commonwealth, recognizing rather than affecting to sanction its Constitution. Congress may impose conditions which the State Constitution must fulfill. But the authority of the State Constitutions does not flow from Congress, but from acceptance by the citizens of the States for which they are made. *Bryce's American Commonwealth*, Vol. 1, pp. 416-7.

The State Constitutions of America well deserve to be compared with those of the self-governing British colonies. But one remarkable difference must be noted here. The constitutions of British colonies have all proceeded from the Imperial Parliament of the United Kingdom, which retains its full legal power of legislating for every

part of the British dominions. In many cases a colonial provides that it may be itself altered by the colonial legislature, of course with the assent of the Crown; but inasmuch as in its origin it is a statutory constitution, not self-grown, but planted as a shoot by the Imperial Congress, on the other hand, has no power to alter a State constitution. And whatever power of alteration has been granted to a British colony is exercisable by the legislature of the colony, not, as in America, by the citizens at large.

The original Constitutions of the States, whether of the old thirteen or of the new twenty-five, have been in nearly every case subsequently recast, in some instances five, six, or even seven times, as well as amended in particular points. *Bryce's American Commonwealth*, Vol. 1, p. 418.

### Steps Toward Union

In July, 1776, the Congress of the thirteen united colonies declared that "these colonies are, and of right ought to be, free and independent States." The denial of this asserted right and the attempted coercion made it manifest that a bond of union was necessary, for the common defense.

In November of the next year, viz., 1777, articles of confederation and perpetual union were entered into by the thirteen States under the style of "The United States of America." The government instituted was to be administered by a congress of delegates from the several States, and each State to have an equal voice in legislation. The Government so formed was to act through and by the States, and having no power to enforce its requisitions upon the States, embarrassment was early realized in its efforts to provide for the exigencies of war. After the treaty of peace and recognition of the independence of the States, the difficulty of raising revenue and regulating commerce was so great as to lead to repeated efforts to obtain from the States additional grants of power. Under the Articles of Confederation no amendment of them could be made except by the unanimous consent of the States, and this it had not been found possible to obtain for the powers requisite to the efficient discharge of the functions intrusted to the Congress. Hence arose the proceedings for a convention to amend the articles of confederation. The result was the formation of a new plan of government, entitled "The Constitution of the United States of America." *Davis on The Rise and Fall of The Confederate Government*, Vol. 1, p. 193.

## DECLARATION OF INDEPENDENCE

IN CONGRESS, JULY 4, 1776.

### THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA

WHEN, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.



We hold these truths to be self-evident:—that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate, that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government. The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these States. To prove this, let facts be submitted to a candid world.

He has refused his assent to laws the most wholesome and necessary for the public good. He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained: and when so suspended he has utterly neglected to attend to them. He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature—a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the repository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly, for opposing, with manly firmness, his invasions on the rights of the people.

He has refused, for a long time after such dissolution, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the State remaining, in the meantime, exposed to all the dangers of invasion from without and convulsions within.

He has endeavored to prevent the population of these States; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone, for the tenure of their offices and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers, to harass our people, and eat out their substance.

He has kept among us, in times of peace, standing armies, without the consent of our legislatures.

He has affected to render the military independent of, and superior to the civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these States:

For cutting off our trade with all parts of the world:

For imposing taxes on us without our consent:

For depriving us, in many cases, of the benefits of trial by jury:

For transporting us beyond seas to be tried for pretended offenses.

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies:

For taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the forms of our government:

For suspending our own legislatures, and declaring themselves invested with powers to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny, already begun with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrections among us, and has endeavored to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions.

In every stage of these oppressions we have petitioned for redress in the most humble terms: our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in attentions to our British brethren. We have warned them, from time to time, of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They too have been deaf to the voice

of justice and consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind—enemies in war, in peace, friends.

We, therefore, the representatives of the UNITED STATES OF AMERICA, in GENERAL CONGRESS assembled, appealing to the Supreme Judge of the World for the rectitude of our intentions, do, in the name and by authority of the good people of these colonies, solemnly publish and declare, that these United Colonies are, and of right ought to be, free and independent States; that they are absolved from all allegiance to the British crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved; and that, as *FREE AND INDEPENDENT STATES*, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which *INDEPENDENT STATES* may of right do. And, for the support of this declaration, with a firm reliance on the protection of *DIVINE PROVIDENCE*, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

JOHN HANCOCK.

*New Hampshire*

JOSIAH BARTLETT  
WILLIAM WHIPPLE  
MATTHEW THORNTON

*Massachusetts Bay*

SAMUEL ADAMS  
JOHN ADAMS  
ROBERT TREAT PAYNE  
ELBRIDGE GERRY

*Rhode Island, &c.*

STEPHEN HOPKINS  
WILLIAM ELLERY

*Connecticut*

ROGER SHERMAN  
SAMUEL HUNTINGTON  
WILLIAM WILLIAMS  
OLIVER WOLCOTT

*New York*

WILLIAM FLOYD  
PHILIP LIVINGSTON  
FRANCIS LEWIS  
LEWIS MORRIS

*New Jersey*

RICHARD STOCKTON  
JOHN WITHERSPOON  
FRANCIS HOPKINSON  
JOHN HART  
ABRAHAM CLARK

*Pennsylvania*

ROBERT MORRIS  
BENJAMIN RUSH  
BENJAMIN FRANKLIN  
JOHN MORTON  
GEORGE CLYMER  
JAMES SMITH  
GEORGE TAYLOR  
JAMES WILSON  
GEORGE ROSS

*Delaware*

CÆSAR RODNEY  
GEORGE READ  
THOMAS MCKEAN

*Maryland*

SAMUEL CHASE  
WILLIAM PACA  
THOMAS STONE  
CHARLES CARROLL  
OF CARROLLTON

*Virginia*

GEORGE WYTHE  
RICHARD HENRY LEE  
THOMAS JEFFERSON  
BENJAMIN HARRISON  
THOMAS NELSON, JR.  
FRANCIS LIGHTFOOT LEE  
CARTER BRAXTON

## North Carolina

WILLIAM HOOPER  
 JOSEPH HEWES  
 JOHN PENN

## Georgia

BUTTON GWINNETT  
 LYMAN HALL  
 GEORGE WALTON

## South Carolina

EDWARD RUTLEDGE  
 THOMAS HEYWARD, JR.  
 THOMAS LYNCH, JR.  
 ARTHUR MIDDLETON

The Declaration of Independence, written by the inspired pen of Jefferson, was the Magna Charta of American freedom, the cornerstone of the temple of free thought, free speech, free press. "It sounded through the land like Roderick's bugle-note in the Highlands; it rallied the wavering and cheered the firm; it removed doubt and fixed a purpose; it was the guide which leaving by-paths and cross-cuts, got into the plain, straight road and said to the wandering hosts, 'Come on'; it settled the debate, removed the doubt, fixed the resolution; it burned the bridge; it crossed the dead line; it took the route toward that bourne from which no rebel returns save with a rope around his neck; it was a call to nationality, a watch-word, a rallying point; its official statement of ultimate aim and object becoming the pillar of fire which led the people through the darkest night of their dread journey toward the Republic." Jefferson regarded the authorship of that document worthy a place on his monument, because it ended civic "Tyranny over the human mind." *18 Jefferson's Writings, Prefatory Matter, vi, vii. (Mem. ed.)*

Mr. Jefferson thus states the origin and purpose of the Declaration of Independence:

With respect to our rights, and the acts of the British government contravening those rights, there was but one opinion on this side of the water. All American Whigs thought alike on these subjects. When forced, therefore, to resort to arms for redress, an appeal to the tribunal of the world was deemed proper for our justification. This was the object of the Declaration of Independence. Not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common-sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take. Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc. *16 Jefferson's Writings, (Mem. ed.), 11, 118-19.*

# ARTICLES OF CONFEDERATION

IN CONGRESS, JULY 9, 1778.

## ARTICLES OF CONFEDERATION AND PERPETUAL UNION

Between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

### ARTICLE I

The style of this confederacy shall be, "*The United States of America.*"

### ARTICLE II

Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

### ARTICLE III

The said states hereby severally enter into a firm league of friendship with each other for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all the force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

### ARTICLE IV

§1. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and egress to and from any other state, and shall enjoy therein all the privileges of trade and commerce subject to the same duties, impositions and restrictions as the inhabitants thereof respectively; *Provided*, that such restrictions shall not extend so far as to prevent the removal of property imported into any state to any other state of which the owner is an inhabitant; *Provided, also*, that no imposition, duties or restriction shall be laid by any state on the property of the United States, or either of them.

§2. If any person guilty of or charged with treason, felony, or other high misdemeanor in any state shall flee from justice and be found in any of the United States, he shall, upon the demand of the governor or executive power of the state from which he fled, be delivered up, and removed to the state having jurisdiction of his offense.

§3. Full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state.



## ARTICLE V

§1. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each state to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

§2. No state shall be represented in congress by less than two, nor more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person being a delegate be capable of holding any office under the United States for which he, or any other for his benefit, receives any salary, fees, or emolument of any kind.

§3. Each state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of these states.

§4. In determining questions in the United States in congress assembled, each state shall have one vote.

§5. Freedom of speech and debate in congress shall not be impeached or questioned in any court or place out of congress, and the members of congress shall be protected in their persons from arrests and imprisonments during the time of their going to and from and attendance on congress, except for treason, felony, or breach of the peace.

## ARTICLE VI

§1. No state, without the consent of the United States in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty, with any king, prince, or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state; nor shall the United States in congress assembled, or any of them, grant any title of nobility.

§2. No two or more states shall enter into any treaty, confederation or alliance whatever, between them, without the consent of the United States in congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

§3. No state shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States in congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by congress to the courts of France and Spain.

§4. No vessels of war shall be kept up in time of peace by any state, except such number only as shall be deemed necessary by the United States in congress assembled, for the defense of such state or its trade; nor shall any body of forces be kept up by any state in time of peace, except such number only as in the judgment of the United States in congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such state; but every state



shall always keep up a regular and well-disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use in public stores a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

§5. No state shall engage in any war without the consent of the United States in congress assembled, unless such state be actually invaded by the enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of delay till the United States in congress assembled can be consulted; nor shall any state grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in congress assembled, and then only against a kingdom or state, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in congress assembled, unless such state be infested by pirates, in which case vessels of war may be fitted out for that occasion and kept so long as the danger shall continue, or until the United States in congress assembled shall determine otherwise.

#### ARTICLE VII

When land forces are raised by any state for the common defense, all officers of or under the rank of colonel shall be appointed by the legislature of each state respectively by whom such forces shall be raised, or in such manner as such state shall direct, and all vacancies shall be filled up by the state which first made the appointment.

#### ARTICLE VIII

All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States in congress assembled shall, from time to time, direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states, within the time agreed upon by the United States in congress assembled.

#### ARTICLE IX

§1. The United States in congress assembled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article, of sending and receiving ambassadors, entering into treaties and alliances; *Provided*, that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of

the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining finally appeals in all cases of captures; *Provided*, that no member of congress shall be appointed a judge of any of the said courts.

§2. The United States in congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more states concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent of any state in controversy with another, shall present a petition to congress stating the matter in question and praying for a hearing, notice thereof shall be given by order of congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as congress shall direct, shall, in the presence of congress, be drawn out by lot; and the persons whose names shall be drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which congress shall judge sufficient; or being present, shall refuse to strike, the congress shall proceed to nominate three persons out of each state, and the secretary of congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive; the judgment or sentence and other proceedings being in either case transmitted to congress, and lodged among the acts of congress, for the security of the parties concerned; *Provided, also*, that no state shall be deprived of territory for the take an oath, to be administered by one of the judges of the supreme or superior court of the state where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward;" *Provided, also*, that no state shall be deprived of territory for the benefit of the United States.

§3. All controversies concerning the private right of soil claimed under different grants of two or more states, whose jurisdictions, as they may respect such lands, and the states which passed such grants are adjusted, the said grants or either of them being at the same time

claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the congress of the United States, be finally determined, as near as may be, in the same manner, as is before prescribed for deciding disputes respecting territorial jurisdiction between different states.

§4. The United States in congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states; fixing the standard of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians not members of any of the states; *Provided*, that the legislative right of any state, within its own limits, be not infringed or violated; establishing and regulating post-offices from one state to another throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office; appointing all officers of the land forces in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States; making rules for the government and regulation of the said land and naval forces, and directing their operations.

§5. The United States in congress assembled shall have authority to appoint a committee, to sit in the recess of congress, to be denominated "*A Committee of the States*," and to consist of one delegate from each state; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction; to appoint one of their number to preside; *Provided*, That no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses; to borrow money or emit bills on the credit of the United States, transmitting every half year to the respective states an account of the sums of money so borrowed or emitted; to build and equip a navy; to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state, which requisition shall be binding; and thereupon the legislature of each state shall appoint the regimental officers, raise the men, clothe, arm and equip them, in a soldier-like manner, at the expense of the United States; and the officers and men so clothed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in congress assembled; but if the United States in congress assembled shall, on consideration of circumstances, judge proper that any state should not raise men, or should raise a smaller number than its quota, and that any other state should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed and equipped in the same manner as the quota of such state, unless the legislature of such state shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise, officer, clothe, arm and equip as many of such extra number as they judge can be safely spared, and the offi-

cers and men so clothed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in congress assembled.

§6. The United States in congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine states assent to the same, nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the vote of a majority of the United States in congress assembled.

§7. The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each state, on any question, shall be entered on the journal when it is desired by any delegate; and the delegates of a state, or any of them, at his or their request, shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several states.

#### ARTICLE X

The committee of the states, or any nine of them, shall be authorized to execute, in the recess of congress, such of the powers of congress as the United States in congress assembled, by the consent of nine states, shall, from time to time, think expedient to vest them with; *Provided*, that no power be delegated to the said committee for the exercise of which, by the Articles of Confederation, the voice of nine states, in the congress of the United States assembled, is requisite.

#### ARTICLE XI

Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.

#### ARTICLE XII

All bills of credit emitted, moneys borrowed, and debts contracted by or under the authority of congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for the payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

#### ARTICLE XIII

Every state shall abide by the determination of the United States in congress assembled, in all questions which by this confederation



are submitted to them; and the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a congress of the United States, and be afterward confirmed by the legislature of every state.

And whereas, it hath pleased the great Governor of the world to incline the hearts of the legislatures we respectfully represent in congress, to approve of, and to authorize us to ratify the said Articles of Confederation and perpetual union, KNOW YE, that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual union, and all and singular the matters and things therein contained. And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determination of the United States in congress assembled, in all questions which by the said confederation are submitted to them; and that the articles thereof shall be inviolably observed by the States we respectfully represent, and that the union shall be perpetual. In witness whereof, we have hereunto set our hands, in congress.

Done at Philadelphia in the State of Pennsylvania, the 9th day of July, in the year of our Lord, 1778, and in the third year of the Independence of America.

*New Hampshire*

JOSIAH BARTLETT  
JOHN WENTWORTH, JR.

*Massachusetts Bay*

JOHN HANCOCK  
SAMUEL ADAMS  
ELBRIDGE GERRY  
FRANCIS DANA  
JAMES LOVELL  
SAMUEL HOLTEN  
WILLIAM ELLERY  
HENRY MARCHANT  
JOHN COLLINS

*Pennsylvania*

ROBERT MORRIS  
DANIEL ROBERDEAU  
JONA. BAYARD SMITH  
WILLIAM CLINGAN  
JOSEPH REED

*Delaware*

THOS. M'KEAN  
JOHN DICKINSON  
NICHOLAS VANDYKE

*Maryland*

JOHN HANSON  
DANIEL CARROLL

*Virginia*

RICHARD HENRY LEE  
JOHN BANNISTER  
THOMAS ADAMS  
JNO. HARVIE  
FRANCIS LIGHTFOOT LEE

*Connecticut*

ROGER SHERMAN  
SAMUEL HUNTINGTON  
OLIVER WOLCOTT  
TITUS HOSMER  
ANDREW ADAMS

*New York*

JAS. DUANE  
FRA. LEWIS  
WM. D'UER  
GOUV. MORRIS

*New Jersey*

JNO. WITHERSPOON  
NATH. SCUDDER



*North Carolina*

JOHN PENN  
 CORNS. HARNETT  
 JNO. WILLIAMS

*Georgia*

JNO. WALTON  
 EDW. TELFAIR  
 EDWD. LANGWORTHY

*South Carolina*

HENRY LAURENS  
 WILLIAM HENRY DRAYTON  
 JNO MATTHEWS  
 RICHARD HUTSON  
 THOMAS HEYWARD, JR.

The Federal government was created in 1777 by the union of thirteen colonies of Great Britain in "certain articles of confederation and perpetual union," the first one of which declared that "the stile of this confederacy shall be the United States of America." Each member of the confederacy was denominated a State. Provision was made for the representation of each State by not less than two nor more than seven delegates; but no mention was made of territories or other lands, except in Art. XI, which authorized the admission of Canada, upon its "acceding to this confederation," and of other colonies if such admission were agreed to by nine States. At this time several States made claims to large tracts of land in the unsettled West, which they were at first indisposed to relinquish. Disputes over these lands became so acrid as nearly to defeat the confederacy, before it was fairly put in operation. Several of the States refused to ratify the articles, because the convention had taken no steps to settle the titles to these lands upon principles of equity and sound policy; but all of them, through fear of being accused of disloyalty, finally yielded their claims, though Maryland held out until 1781. Most of these States in the meantime having ceded their interests in these lands, the confederate Congress, in 1787, created the first territorial government northwest of the Ohio River, provided for local self-government, a bill of rights, a representation in Congress by a delegate, who should have a seat "with a right of debating, but not of voting," and for the ultimate formation of States therefrom, and their admission into the Union on an equal footing with the original States.

The confederacy, owing to well-known historical reasons, having proven a failure, a new Constitution was formed in 1787 by "the people of the United States" "for the United States of America," as its preamble declares. *182 U. S. Rep., pp. 249-250.*

When it became apparent that a war had been entered on which must result either in the destruction of American liberties or in the introduction to the world of a new nation, it was evident to all those interested in the conduct of public affairs that the revolutionary congress was at once too weak and too indefinite a bond between the states. It was necessary to devise a scheme of association which would insure vigor and faithful co-operation in the conduct of hostilities and would also more clearly apportion the powers of government between the states and the Congress. The Congress, to this end, prepared a series of "Articles of Confederation and Perpetual

Union," and submitted them to the states for their approval and ratification in 1777. Before the close of the following year the articles had been ratified by all the states except Delaware and Maryland. Of these, the former gave in its adherence in 1779, and the latter in 1781. *Black on Constitutional Laws, 37.*

The articles of confederation were designed to bind the states together in a "firm league," but they proved to be no better than a rope of sand. Washington spoke of the confederation as "a shadow without a substance" and described Congress as a "nugatory body." The Union, as thus constituted, was dependent on the states. There was a central government, but it was not intrusted with the means of its own preservation. It had no executive; it had no courts; it had no power to raise supplies. "Congress had hardly more than an advisory power at the best. It had no power to prevent or punish offenses against its own laws, or even to perform effectively the duties enjoined upon it by the articles of confederation. It alone could declare war, but it had no power to compel the enlistment, arming, or support of an army. It alone could fix the needed amount of revenue, but the taxes could only be collected by the states at their own pleasure. It alone could make treaties with foreign nations, but it had no power to prevent individual states from violating them. Even commerce, foreign and domestic, was to be regulated entirely by the states, and it was not long before state selfishness began to show itself in the regulation of duties on imports." *Black on Constitutional Laws, 39.*

The new form of government differed in many essential particulars from the old one. The delegates, intent on the purpose to give greater efficiency to the government of the Union, proposed greatly to enlarge its powers, so much so that it was not deemed safe to confide them to a single body and they were consequently distributed between three independent departments of government, which might be a check upon one another. The Constitution did not, like the Articles of Confederation, declare that the States had agreed to a perpetual union, but distinctly indicated the hope of its perpetuity by the expression in the preamble of the purpose to "secure the blessings of liberty to ourselves and our posterity." The circumstances under which the Union of the Constitution was formed justified the hope of its perpetuity, but the brief existence of the Confederation may have been a warning against the renewal of the assertion that the compact should be perpetual. *Davis on The Rise and Fall of The Confederate Government, Vol. 1, 194.*

These powers as proposed by the Constitution were so extensive as to create alarm and opposition by some of the most influential men in many of the States. It is known that the objection of the patriot Samuel Adams was only overcome by an assurance that such an amendment as the tenth would be adopted. Like opposition was by like assurance elsewhere overcome. That article is in these words: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

Amendment, however, of the delegated powers was made more easy than it had been under the Constitution. Ratification by three-fourths of the States was sufficient under the Constitution for the adoption of an amendment to it. This power of amendment threatens to be the Aaron's rod which will swallow up the rest. *Davis on The Rise and Fall of The Confederate Government, Vol. 1, 195.*

When the Articles of Confederation were amended, when the new Constitution was substituted in their place and the General Government reorganized, its structure was changed, additional powers were conferred upon it, and thereby subtracted from the powers theretofore exercised by the State governments; but the seat of the sovereignty—the source of all those delegated and dependent powers—was not disturbed. There was a new Government or an amended Government—it is entirely immaterial in which of these lights we consider it—but no new PEOPLE was created or constituted. The people, in whom alone sovereignty inheres, remained just as they had been before. The only change was in the form, structure, and relations of their governmental agencies.

No doubt, the States—the people of the States—if they had been so disposed, might have merged themselves into one great consolidated State, retaining their geographical boundaries merely as matters of convenience. But such a merger must have been distinctly and formally stated, not left to deduction or implication.

Men do not alienate even an estate, without positive and express terms and stipulations. But in this case not only was there no express transfer—no formal surrender—of the pre-existing sovereignty, but it was expressly provided that nothing should be *understood* as even *delegated*—that everything was reserved, unless granted in express terms. The monstrous conception of the creation of a new people, invested with the whole or a great part of the sovereignty which had previously belonged to the people of each State, has not a syllable to sustain it in the Constitution, but is built up entirely upon the palpable misconstruction of a single expression in the preamble. *Davis on The Rise and Fall of The Confederate Government, Vol. 1, 154-5.*

### Defects and Vices of the Confederation

Mr. Hamilton in the *Federalist*, Number XV, pointed out some of the greatest defects as follows:

The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of which they consist. Though this principle does not run through all the powers delegated to the Union, yet it pervades and governs those on which the efficacy, the United States has an indefinite discretion to make requisitions for men and money, but they have no authority to raise either, by regulations extending to the individual citizens of America. The consequence of this is, that though in theory their

resolutions concerning those objects are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option.

It is a singular instance of the capriciousness of the human mind, that after all the admonitions we have had from experience on this head, there should still be found men who object to the new Constitution, for deviating from a principle which has been found the bane of the old, and which is in itself evidently incompatible with the idea of GOVERNMENT; a principle, in short, which, if it is to be executed at all, must substitute the violent and sanguinary agency of the sword to the mild influence of the magistracy. *Hamilton in Federalist, Number XV.*

Government implies the power of making laws. It is essential to the idea of a law, that it is attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation. This penalty, whatever it may be, can only be inflicted in two ways: by the agency of the courts and ministers of justice, or by military force; by the COERCION of the magistracy, or by the COERCION of arms. The first kind can evidently apply only to men; the last kind must of necessity, be employed against bodies politic, or communities, or States. It is evident that there is no process or a court by which the observance of the laws can, in the last resort, be enforced. Sentences may be denounced against them for violations of their duty; but these sentences can only be carried into execution by the sword. *Hamilton in Federalist, Number XV.*

The Articles of Confederation were ratified by the States, acting through their legislatures, the Constitution was ratified by the people of the States, through and by conventions. This is well stated in Number XXII of the *Federalist*:

It has not a little contributed to the infirmities of the existing federal system, that it never had a ratification by the PEOPLE. Resting on no better foundation than the consent of the several legislatures, it has been exposed to frequent and intricate questions concerning the validity of its powers, and has, in some instances, given birth to the enormous doctrine of a right of legislative repeal. Owing its ratification to the law of a State, it has contended that the same authority might repeal the law by which it was ratified. However gross a heresy it may be to maintain that a PARTY to a COMPACT has a right to revoke that COMPACT, the doctrine itself has had respectable advocates. The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority. *Hamilton in Federalist, Number XXII.*



## Congress of the Confederation

The difference between the Congress of the Confederation and that of the Federal Constitution is so broad that the action of the former can, in no just sense, be taken as a precedent for the latter. The Congress of the Confederation represented the States in their sovereignty, each delegation having one vote, so that all the States were of equal weight in the decision of any question. It had legislative, executive, and in some degree judicial powers, thus combining all departments of government in itself. During its recess a committee known as a Committee of the States exercised the powers of the Congress, which was in spirit, if not in fact, an assemblage of the States.

On the other hand, the Congress of the Constitution is only the legislative department of the General Government, with powers strictly defined and expressly limited to those delegated by the States. It is further held in check by an executive and a judiciary, and consists of two branches, each having peculiar and specified functions. *Davis on The Rise and Fall of the Confederate Government, Vol. 1, 10.*

### The Differences Between Confederation and Union

Mr. Calhoun thus states the differences:

Our first experiment in government was on the old form of a simple confederacy,—unmodified, and extending the principle of the concurring majority alike to the Constitution (the articles of union) and to the Government which it constituted. It failed—and the present structure was reared in its place, combining, for the first time in a confederation, the absolute with the concurring majority; and thus uniting the justice of the one with the energy of the other.

The new Government was reared on the foundation of the old, strengthened, but not changed. It stands on the same solid basis of the concurring majority, perfected by the sanction of the people of the States directly given, and not indirectly through the State governments, as their representatives, as in the old confederation. With this difference, the authority which made the two Constitutions—which granted their powers, and ordained and organized their respective Governments to execute them—is the same. *6 Calhoun's Works, p. 185.*

## ORDINANCE OF 1787

### AN ORDINANCE

For the government of the Territory of the United States northwest of the River Ohio.

*Be it ordained by the United States in Congress assembled, That the said territory, for the purpose of temporary government, be one district, subject, however, to be divided into two districts, as the future circumstances may, in the opinion of congress, make it expedient.*



*Be it ordained by the authority aforesaid,* That the estates both of residents and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among their children, and the descendants of a deceased child, in equal parts, the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin in equal degree, and among collaterals, the children of a deceased brother or sister of an intestate shall have, in equal parts among them, their deceased parent's share, and there shall, in no case, be a distinction between a kindred of the whole and half blood, saving, in all cases, to the widow of the intestate her third part of the real estate for life, and one-third of the personal estate; and this law relative to descents and dower shall remain in full force until altered by the legislature of the district; and until the governor and judges shall adopt laws, as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be (being of full age), and attested by three witnesses; and real estates may be conveyed by lease and releases, or bargain and sale, signed, sealed and delivered by the person (being of full age) in whom the estates may be, and attested by two witnesses; *Provided,* that such wills be duly proved, and such conveyances be acknowledged or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers shall be appointed for that purpose; and personal property may be transferred by delivery, saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskasias, St. Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them relative to the descent and conveyance of property.

*Be it ordained by the authority aforesaid,* That there shall be appointed from time to time, by congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by congress. He shall reside in the district and have a freehold estate therein in one thousand acres of land, while in the exercise of his office.

There shall be appointed from time to time, by congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked. He shall reside in the district, and have a freehold estate therein in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department, and transmit authentic copies of such acts and proceedings, every six months, to the secretary of congress.

There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdiction, and reside in the district, and shall have each therein a freehold estate in five hundred acres of land, while in the exercise of their offices; and their commission shall continue in force during good behavior.

The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original states, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to congress from time to time; which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

The governor for the time being shall be commander-in-chief of the militia, appoint and commission all officers in the same below the rank of general officers. All general officers shall be appointed and commissioned by congress.

Previous to the organization of the general assembly, the governor shall appoint such magistrates and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order of the same.

After the general assembly shall be organized, the powers and duties of the magistrates and other civil officers shall be regulated and defined by the said assembly, but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships to represent them in the general assembly; *Provided*, that for every five hundred free male inhabitants there shall be one representative, and so on, progressively with the number of free male inhabitants, shall the right of representation increase until the number of representatives shall amount to twenty-five; after which, the number and proportion of representatives shall be regulated by the legislature; *Provided*, that no person be eligible or qualified to act as a representative unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years, and, in either case, shall likewise hold in his own right, in fee simple, two hundred acres of land within the same; *Provided*, also, that a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative.

The representatives thus elected shall serve for the term of two years; and in case of the death of a representative or removal from

office, the governor shall issue a writ to the county or township for which he was a member, to elect another in his stead, to serve for the residue of the term.

The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by congress, any three of whom to be a quorum; and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected, the governor shall appoint a time and place for them to meet together, and when met they shall nominate ten persons, residents in the district, and each possessed of a freehold in five hundred acres of land, and return their names to congress, five of whom congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to congress, one of which congress shall appoint and commission for the residue of the term; and every five years, four months at least before the expiration of the time of service of the members of the council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to congress, five of whom congress shall appoint and commission to serve as members of the council five years, unless sooner removed.

And the governor, legislative council and house of representatives shall have authority to make laws, in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared.

And all bills passed by a majority in the house, and by a majority in the council shall be referred to the governor for his assent, but no bill or legislative act whatever shall be of any force without his assent.

The governor shall have power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.

The governor, judges, legislative council, secretary, and such other officers as congress shall appoint in the district, shall take an oath or affirmation of fidelity and of office, the governor before the president of congress, and all other officers before the governor.

As soon as a legislature shall be formed in the district, the council and house, assembled in one room, shall have authority, by joint ballot, to elect a delegate to congress, who shall have a seat in congress, with the right of debating, but not of voting during this temporary government.

And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions and governments which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of states, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original states, at as early a period as may be consistent with the general interest—

*It is hereby ordained and declared by the authority aforesaid, That the following articles shall be considered as articles of compact between the original states and the people and states in the said territory, and forever remain unalterable, unless by common consent, to wit:*

ARTICLE 1. No person demeaning himself in a peaceable, orderly manner shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.

ART. 2. The inhabitants of said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses where the proof shall be evident or the presumption great.

All fines shall be moderate; no cruel or unusual punishment shall be inflicted.

No man shall be deprived of his liberty or property, but by judgment of his peers, or the law of the land; and, should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or to have force in the said territory, that shall, in any manner whatever, interfere with, or affect, private contracts, or engagements, bona fide and without fraud, previously formed.

ART. 3. Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded, or disturbed, unless in just and lawful wars, authorized by congress; but laws, founded in justice and humanity, shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

ART. 4. The said territory, and the state which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made, and to all the acts and ordinances of the United States in congress assembled conformable thereto.

The inhabitants and settlers in the said territory shall be subject to pay a part of the federal debts, contracted, or to be contracted, and a proportional part of the expenses of government, to be apportioned on them by congress according to the same common rule and measure by which apportionment thereof shall be made on other states; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new states, as in the original states, within the time agreed upon by the United States in congress assembled. The legislatures of those districts, or new states, shall never interfere with the primary disposal of the soil by the United States in congress assembled, nor with



any regulations congress may find necessary for securing the title in such soil to bona fide purchasers. No tax shall be imposed on lands, the property of the United States, and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax imposed, or duty therefor.

ART. 5. There shall be formed in the said territory not less than three nor more than five states, and the boundaries of the states, as soon as Virginia shall alter her act of cession, and consent to the same, shall become fixed and established as follows, to wit:

The Western state in the said territory shall be bounded by the Mississippi, the Ohio and Wabash rivers, a direct line drawn from the Wabash and Port Vincents due north to the territorial line between the United States and Canada, and by said territorial line to the Lake of the Woods and Mississippi.

The Middle state shall be bounded by the said direct line, the Wabash, from Port Vincents to the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line.

The Eastern state shall be bounded by the last-mentioned direct line, the Ohio, Pennsylvania, and the said territorial line.

*Provided however, and it is further understood and declared, that the boundaries of these three states shall be subject so far to be altered that, if congress shall hereafter find it expedient, they shall have authority to form one or two states in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan, and when any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the congress of the United States, on an equal footing with the original states, in all respects whatever and shall be at liberty to form a permanent constitution and state government; Provided, the constitution and government so to be formed shall be republican, and in conformity to the principles contained in these articles; and so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the state than sixty thousand.*

ART. 6. There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted; *Provided always,* that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor, or service, as aforesaid.

*Be it ordained by the authority aforesaid, that the resolutions of the twenty-third of April, seventeen hundred and eighty-four, relative to the subject of this ordinance, be and the same are hereby repealed and declared null and void.*

Adopted July 13, 1787.



In the brief of counsel in the *Insular Case* it is said:

The great ordinance for the government of the Northwest Territory, drawn originally by Jefferson,<sup>1</sup> and somewhat modified before it passed through Congress, was in some respects a prototype of the Constitution itself. It embodied the ideas which led up to the foundation of the Constitution, based upon the political philosophy adhered to by most of the framers of the Constitution. It gave to the hardy and self-reliant pioneers in that Territory political rights of self-government and secured to them the guarantees of personal freedom in accordance with the most enlightened rules of the common law. That this ordinance was regarded as sacred and as unchangeable as the law of the Medes and Persians, appears from its language, which declares it to be a compact between the people of the Territories and the people of the States, unchangeable except by consent. Almost the first act of the first Congress, in which many of the framers of the Constitution sat, was to re-enact the Northwest ordinance in its entirety. *182 U. S. Rep. 47.*

Chief Justice White in a concurring opinion in the *Insular Cases*, said:

The opinion has been expressed that the ordinance of 1787 became inoperative and a nullity on the adoption of the Constitution (Taney, C. J., in *Scott v. Sandford*, 19 How. 393, 438,) while, on the other hand, it has been said that the ordinance of 1787 was "the most solemn of all engagements," and became a part of the Constitution of the United States by reason of the sixth article, which provided that "all debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the confederation." Per Baldwin, J., concurring opinion in *Lessee of Pollard's Heirs v. Kibbe*, 14 Pet. 353, 417, and per Catron, J., in dissenting opinion in *Strader v. Graham*, 10 How. 82, 98. Whatever view may be taken of this difference of legal opinions, my mind refuses to assent to the conclusion that under the Constitution the provision of the Northwest Territory ordinance making such territory forever a part of the confederation was not binding on the government of the United States when the Constitution was formed. When it is borne in mind that large tracts of this territory were reserved for distribution among the continental soldiers, it is impossible for me to believe that it was ever considered that the result of the cession was to take the Northwest Territory out of the Union, the necessary effect of which would have been to expatriate the very men who by their suffering and valor had secured the liberty of their united country. Can it be conceived that North Carolina, after the adoption of the Constitution, would cede to the general government the territory south of the Ohio River, in-

<sup>1</sup>There have been two varying contentions as to who was the author and draftsman of this ordinance. One contention was that Mr. Dane, of Massachusetts, was its author as well as its draftsman. He probably did make the final draft of it and may have been

the author of some of its details; but no one can read it in connection with Jefferson's writings on government and fail to conclude that the ideas and words used to express them in the main are those of Jefferson.

tending thereby to expatriate those dauntless mountaineers of North Carolina who had shed lustre upon the Revolutionary arms by the victory of King's Mountain? And the rights bestowed by Congress after the adoption of the Constitution, as I shall proceed to demonstrate, were utterly incompatible with such a theory.

Beyond question, in one of the early laws enacted at the first session of the First Congress, the binding force of the ordinance was recognized, and certain of its provisions concerning the appointment of officers in the territory were amended to conform to the ordinance to the new Constitution, c. 8, August 7, 1789, 1, Stat. 50. *182 U. S. Rep., pp. 320-321.*

This<sup>1</sup> is the name given to the great stretch of territory ceded to the United States by Great Britain at the close of the revolutionary war. Out of it were afterwards formed the five states of Ohio, Indiana, Illinois, Wisconsin, and Michigan. In 1787, before the adoption of the constitution of the United States, the Congress of the confederation framed an "Ordinance for the Government of the Northwest Territory," which is chiefly interesting to the student of constitutional law on account of the liberal provisions which it made for the security of civil, religious, and political liberty, and for the fact that it prohibited slavery and involuntary servitude, except as a punishment for crime, within the territory. This ordinance was not abrogated by the adoption of the federal constitution, but remained in force as the municipal law of the territory in so far as it was not inconsistent with the constitution. *Spoooner v. McConnell*, 1 McLean, Fed. Cas. Co. 13, 245. *Black on Constitutional Laws*, 232.

The claim of the state of Virginia to dominion over that region of country called the Territory of the Northwest of the Ohio river, which is now filled with a population of many millions and divided into five states of the Union, was not undisputed in the days when that state was a province of Great Britain. The French had numerous settlements there; and the government of Great Britain claimed, both by the acquisition of Canada and by settlement, a large part of that loosely defined country. They had their military posts there, as well as peaceful villages. The Indians also denied all right of the Colony of Virginia to rule over them; and some of the most warlike tribes of that race were known to occupy, with claim of exclusive right, the largest part of the country. *91 U. S., 448.*

<sup>1</sup>"The Northwest Territory."

## GOVERNMENT DEFINED

Mr. Justice Miller thus defines government :

A pure monarchy means a despotism, a government where the supreme power is lodged in the hands of one man, a monarch, an autocrat, or whatever else he may be called, who, in his own discretion, discharges all the functions of the executive, legislative, and judicial departments of the government. He decides controversies between private individuals, makes the laws by which their determination is to be controlled, and executes his own decrees.

A pure democracy is one in which every transaction of common interest and private justice is brought before the entire body of the people, and they determine what shall be done in the premises; the government "of the people, by the people, for the people." They make and administer the law, they hear and decide cases, and they execute their judgments.

A pure aristocracy is a form of government in which these powers are held and exercised by a few favored individuals, a limited number of prominent men who have become such by their greater wealth or power, or by inheritance.

I am not aware that there exists at this day in any civilized country a pure example of either of these forms of government. The Chinese monarchy is a close approximation to a pure type, Russia is known as an "absolute monarchy," and the history of Athens and Rome shows the former existence there as a near approach to a pure democracy. Perhaps the purest example of an aristocracy was the Venetian Government, which was successfully carried on for a long time, and attained great power. In a modified form an aristocracy may be said to govern today in England, but it is united with a monarchy. Indeed, all modern governments in civilized countries are combinations and modifications of these three forms.

The United States is a wonderful illustration of their harmonious combination, preserving for the benefit of the people most of the advantages and the best points inherent in each system. We have an executive who is not hereditary, but elective; a legislative body elected by the people; and a judicial body separated from and which may be said to be independent of the other two. *Miller's Const.*, pp. 61-62.

### Difficulties of Forming Governments

If mankind were to resolve to agree in no institution of government, until every part of it had been adjusted to the most exact standard of perfection, society would soon become a general scene of anarchy, and the world a desert. Where is the standard of perfection to be found? Who will undertake to unite the discordant opinions of a whole community in the same judgment of it; and to prevail upon one conceited projector to renounce his INFALLIBLE criterion for the FALLIBLE criterion of his more CONCEITED NEIGHBOR? To answer the purpose of the adversaries of the Con-

stitution, they ought to prove, not merely that particular provisions in it are not the best which might have been imagined, but that the plan upon the whole is bad and pernicious. *Hamilton in The Federalist, Vol. II, Number LXV.*

### Kinds of Governments

Bouviere thus defines and describes the kinds of governments:

Government is the manner in which sovereignty is exercised in the State. It is the means adopted to put the fundamental law of the State in action. It is the function and the very end of the government to apply this fundamental law for the happiness and advantage of all the citizens; for the constitution of the State is the lawful expression of the wants and of the will of all. Hence follows this necessary consequence, that the government is the delegate of society, the State, or the nation. The people, being sovereign, may adopt any of the forms of government which have been devised among them.

There have been at all times, and there are now, different forms of government, the three principal ones are democracy, aristocracy, and monarchy. But these different forms are combined and subdivided to infinity. From the African prince, who disposes freely of the lives and properties of his subjects, to the European monarch, whose power is contained within much narrower bounds; from the savage cazic, who governs his tribe because he is the oldest man in it, to the republican magistrate who is elected by the free suffrage of his fellow citizens, we perceive an infinity of organic combinations.

When the sovereign power is exercised by the people in a body, or by a majority of the people, the government is called a democracy. In this form of government all men are equal in a political and civil point of view. Democracy is the complete triumph of the principle of equality. All the citizens must have an equality of rights and not merely of privileges.

When the sovereign power is exercised by a small number of persons, in their own right, exclusively from the rest of the people, this form of government is called an aristocracy. In an aristocratic country the rulers claim the power to govern in their own right, and not by delegation, as in a representative democracy. Aristocracy and slavery spring from the same root. The first is the parent of the second, for the master and slave appeared on the same day.

When the sovereign power is concentrated in the hands of a single magistrate, the government is a monarchy, whether it bear the name of an empire, a kingdom, a dutchy, or any other.

But the sovereign power may be divided and combined in a thousand different ways; hence, result mixed governments, such as are most of those of civilized nations. Indeed, it may with truth be observed that the constitution of each State, consisting in the manner in which the powers of sovereignty are divided, seldom remains the same for any great length of time. Its form varies more frequently than it would strike one at first blush. in consequence of the encroach-



ments which are insensibly made by one branch of the government over the others. There are, besides these principal forms, a variety of governments, which will here be defined.

Theocracy is a government where the clergy exercise the sovereign power, under a pretence that it is the government of God, and under his immediate direction.

Ochlogracy is a government where the authority is in the hands of the multitude; it is the abuse of a democracy.

Oligarchy is a government where the sovereign authority has been usurped by a few men, when such power ought to reside in the people.

Demagogy is the exaggeration and abuse of democracy, and is a violation of the principle of the sovereignty of the people.

Polyarchy is that form of government in which the authority is confided to several persons; as, for example, the Directory and Consulate, and the late Provisionary government of France. Another example may be given where two brothers, the sons of a king, succeed to the throne and rule jointly.

A representative democracy is a government where the powers of sovereignty are delegated to a body of men, elected from time to time, who exercise them for the benefit of the whole nation. Such is the general government of the United States, and of the several States of the American Union.

Despotism is the state where the powers of the government are not divided, but united in the hands of a single man, whatever may be the title he bears, emperor, king, sultan, president, etc.; where the power of such man is not limited by law, he may, having only his will for a rule make or repeal laws, execute them or not, at his pleasure, etc. This is not properly a form of government but an abuse of government. Despotism is an act of tyranny.

By tyranny is understood the violation of the laws which regulate the exercise of the powers of sovereignty, and tyrant the chief of the State, who, although he may be legitimate, violates them for the purpose of committing arbitrary acts contrary to justice.

The terms tyrant and usurper are often confounded because usurpers are almost always tyrants. But these terms are very different. Even a legitimate king may become a tyrant, if he governs in an unjust and despotic manner; and a usurper may cease to be a tyrant by governing according to justice.

A commonwealth is that form of government in which the administration of public affairs is open or common to all persons, without any special regard to rank of property, as distinguished from monarchy or aristocracy.

A republic, which is another name for commonwealth, is that form of government in which the administration of affairs is open to all the citizens. In another sense the term republic, *res publica*, signifies the state independently of its form of government.

An hierarchy signified originally power of the priests for, in the beginning of societies, the priests were entrusted with all the power; but among the priests themselves were different degrees of power and authority, at the summit of which was the sovereign pontiff, and this was called the hierarchy. Now it signifies not so much power of the priest, as order of power.



Stratocracy is a military government. This word is derived from two Greek words signifying army and power. *Bouvier's Institutes*, Vol. I, pp. 10, 11, 12 and 13.

The constitution of Russia establishes the supreme and arbitrary power of the Czar and determines the order of succession to the throne. That of the German Empire prescribes the rule that the King of Prussia shall be Emperor of Germany, regulates the representation of the component kingdoms and states in the federal legislature. That of the United States establishes a republican form of government and apportions the powers of sovereignty between the Union and the States. But since the formation of the constitution of the United States, and the spread of liberal ideas throughout the civilized world, attendant upon the far-reaching influences of the French Revolution, an era of written constitutions has prevailed. *Black on Constitutional Laws*, 2.

If a king has granted a constitution, its prime object has been to admit the people to a share in the government and to secure their liberties against the exercise of despotic authority. If the people of a state have adopted a democratic constitution, none the less have they deemed it important to specify the rights and immunities which they considered sacred and fundamental, and to make sure provision against their invasion by the men of power. Consequently, when we now speak of "constitutional government" or a "constitutional monarchy," it is this latter idea—the security of popular rights and liberties—which is principally dwelt upon. *Black on Constitutional Laws*, 3.

It is the nature of a republican government, that either the collective body of the people or particular families should be possessed of the supreme power; of a monarchy, that the prince should have this power, but, in the execution of it, should be directed by established laws: of a despotic government, that a single person should rule according to his own will and caprice. *Montesquieu's Works*, Book III, Chapter II.

There are three species of government; *republican*, *monarchical*, and *despotic*. In order to discover their nature, it is sufficient to recollect the common notion, which supposes three definitions, or rather three facts: "That a republican government is that in which the body or only a part of the people is possessed of the supreme power: monarchy, that in which a single person directs every thing by his own will and caprice." *Montesquieu's Works*, Book I, Chapter III.

### Constitutional Requisites of Government

To the mind of that profound jurist and accomplished statesman, Elihu Root, there are five fundamental characteristics of the American system of constitutional government, the unimpaired maintenance of which is essential to the preservation of our liberty and the progressive realization of our democratic ideals. Conservative but not reactionary, recognizing frankly the changing conditions of modern life, welcoming to the council table the noble zeal of the idealist and the reformer, he yet reminds us that "religion, the philosophy of morals, the teaching of history, the experience of every human life,

point to the same conclusion—that in the practical conduct of life the most difficult and the most necessary virtue is self-restraint. It is the first lesson of childhood; it is the quality for which great monarchs are most highly praised; the man who has it not is feared and shunned; it is needed most where power is greatest; it is needed more by men acting in a mass than by individuals, because men in the mass are more irresponsible and difficult of control than individuals." In this same admirable spirit of self-restraint, with calm, wise, and weighty words, free alike from noisy declamation and hot denunciation, Mr. Root approaches the task of stating the essentials of true constitutional government, and vindicating the existing American system as against counsels of destruction and the spirit of short-sighted experimentation. These are the five basic principles upon which he insists:

1. The representative system of government.
2. Protection of individual liberty by specific constitutional limitations.
3. The distribution of governmental powers and the imposition of such limitations upon each will prevent the setting up of despotism.
4. The preservation, in the just balance of their powers and functions, of both the national and state governments.
5. The provision that the observance of constitutional limitations shall be essential to the validity of laws, this to be judged by the courts in each concrete case as it arises. *The Constitutional Review*, Vol. I, 40.

### Origin of Government

In 1815 Mr. Adams wrote Mr. Jefferson as follows:

The question before the human race is, whether the God of Nature shall govern the world by His own laws, or whether priests and kings shall rule it by fictitious miracles? Or, in other words, whether authority is originally in the people, or whether it has descended for 1800 years in a succession of popes and bishops, or brought down from heaven by the Holy Ghost in the form of a dove, in a phial of holy oil? *14 Jefferson's Writings, (Mem. ed.), p. 320.*

### Necessity of Government

The necessity of government is indispensable if freedom and liberty are to be secure. To this end the people must cede to the government some of their natural rights in order to vest it with requisite powers. One of the serious questions which presented itself to the American colonists was whether or not it was best to have all of North America to constitute one nation or to have many nations or states and to confederate them. The latter thought prevailed at first and they formed a confederation of the thirteen colonies, which became states. The confederacy proved to be inefficient and a failure. Those who believed in a strong central government used this

failure as a lever to form one strong central government, modelled after that of Great Britain, some going to the extent of desiring a monarchy, others only a strong republican one in form, while others still clung to the idea of preserving the identity and sovereignty of each state under a better and stronger compact of confederation. The result was a mean between the two extremes, the formation of a compact and dual government, and dividing the powers between the Federal and the State sovereign. The advantages of the union of all our States and people over a division into too many governments as to our relations with foreign nations is well and successfully set forth by Mr. John Jay, our first Chief Justice in the first five numbers of the *Federalist*.

### **History of Government**

Mr. Jefferson makes the following suggestions to a friend and inquirer, as to the best works on Constitutional Government, and the history of ours, to which the following is a part of his reply :

I think there does not exist a good elementary work on the organization of society into civil government: I mean a work which presents in one full and comprehensive view the system of principles on which such an organization should be founded, according to the rights of nature. For want of a single work of that character, I should recommend Locke on Government, Sidney, Priestley's *Essay on the First Principles of Government*, Chipman's *Principles of Government*, and the *Federalist*. Adding, perhaps, Beccaria on crimes and punishments, because of the demonstrative manner in which he has treated that branch of the subject. If your views of political inquiry go further, to the subject of money and commerce, Smith's *Wealth of Nations* is the best book to be read, unless Say's *Political Economy* can be had, which treats the same subjects on the same principles, but in a shorter compass and more lucid manner. But I believe this work has not been translated into our Language.

History in general only informs us what bad government is. But as we have employed some of the best materials of the British constitution in the construction of our own government, a knowledge of British history becomes useful to the American politician. There is, however, no general history of that country which can be recommended. The elegant one of Hume seems intended to disguise and discredit the good principles of the government, and is so plausible and pleasing in its style and manner, as to instill its errors and heresies insensibly into the minds of unwary readers. Baxter has performed a good operation on it. He has taken the text of Hume as his ground work, abridging it by the omission of some details of little interest, and wherever he has found him endeavoring to mislead, by either the suppression of a truth or by giving it a false coloring,

he has changed the text to what it should be, so that he may properly call it Hume's history republicanized. *11 Jefferson's Writings, (Mem. ed.), pp. 222, 223, and 224.*

He also adds that Baxter's work was not popular in England, because it was Republican, and that in consequence thereof, only a few copies ever reached America.

### Object and Purpose of Government

Mr. Madison thus states the objects of government:

Persons and property are the two great subjects on which Governments are to act; and the rights of persons, and the rights of property, are the objects, for the protection of which Government was instituted. These rights cannot well be separated. The personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right. The essence of Government is power; and power, lodged as it must be in human hands, will ever be liable to abuse. In Monarchies, the interests and happiness of all may be sacrificed to the caprice and passion of a despot. In Aristocracies, the rights and welfare of the many may be sacrificed to the pride and cupidity of the few. In Republics, the great danger is, that the majority may not sufficiently respect the rights of the minority. *4 Writings of Madison, pp. 51-2.*

The great object of government is to secure the greatest good to the greatest number.<sup>1</sup> *1 Tucker's Const. 23.*

Mr. Calhoun says it is the Constitution and law of human nature, which originates governments. That without this Constitution and law of human nature, government could not exist, and with it all governments must exist. He says, first, by nature, man is a social creature, and that he has never been found in other than a social condition, and that in no other way could he exist; and second, that this social nature cannot exist without a government. That government is necessary to the existence of society, and society to the existence of man. Society is necessary to perfect the race, and government is necessary to perfect society. Constitutions, Mr. Calhoun says, are contrivances of man; while government is of Divine Ordination. He says the important question is how those invested with the powers of government can be prevented from using them for self-aggrandizement instead of using them to protect and preserve society.<sup>2</sup> He adds:

There is but one way in which this can possibly be done; and that is, by such an organism as will furnish the ruled with the means of resisting successfully this tendency on the part of the rulers to oppression and abuse. Power can only be resisted by power,—and

<sup>1</sup>Mr. Tucker denied this.

<sup>2</sup>1 Calhoun's Works, pp. 1 to 8.



tendency by tendency. Those who exercise power and those subject to its exercise,—the rulers and the ruled,—stand in antagonistic relations to each other. The same constitution of our nature which leads rulers to oppress the ruled,—regardless of the object for which government is ordained,—will, with equal strength, lead the ruled to resist, when possessed of the means of naming peaceable and effective resistance. *1 Calhoun's Works, p. 12.*

There are two kinds of government, absolute and constitutional, Mr. Calhoun says:

Absolute governments, of all forms, exclude all other means of resistance to either authority, than that of force; and, of course, leave no other alternative to the governed, but to acquiesce in oppression, however great it may be, or to resort to force to put down the government. But the dread of such a resort must necessarily lead the government to prepare to meet force in order to protect itself; and hence, of necessity, force becomes the conservative principle of all such governments. *1 Calhoun's Works, pp. 37-8.*

### The People the Source of Government

Mr. Jefferson in his Notes On Virginia, said:

In every government on earth is some trace of human weakness, some germ of corruption and degeneracy, which cunning will discover and wickedness insensibly open, cultivate and improve. Every government degenerates when trusted to the rulers of the people alone. The people themselves, therefore, are its only safe depositaries. *And to render even them safe, their minds must be improved to a certain degree.* (10 Jefferson's Writings, vi.)

The following are Jefferson's axioms and governmental maxims:

Our citizens may be deceived for a while, and have been deceived; but as long as the press can be protected we trust them for light. (Apothegm.)

Every society has a right to fix the fundamental principles of its association. (To W. H. Crawford, 1816.)

They (the people) may be led astray for a moment, but they will soon correct themselves. The people are the only censors of their governors; and even their errors will tend to keep these to the true principles of their institution. (To Edward Carrington, 1787.)

My earnest wish is to see the Republican element of popular control pushed to the maximum of its practicable exercise. (To Isaac H. Tiffany, 1816.)

To the same purport are the following apothegms:<sup>1</sup>

I know no safe depository of the ultimate powers of society but the people themselves.

<sup>1</sup>10 Jefferson's Writings. (Mem. ed.) xi-xii.



The will of the majority honestly expressed should give law.

To inform the minds of the people and to follow their will is the chief duty of those placed at their head.

I have such reliance on the good sense of the body of the people and the honesty of their leaders that I am not afraid of their letting things go wrong to any length in any cause.

### Sovereign Power of Government

Mr. Webster has said, and very justly as far as these United States are concerned: "The sovereignty of government is an idea belonging to the other side of the Atlantic. No such thing is known in North America. Our governments are all limited. In Europe sovereignty is of feudal origin, and imports no more than the state of the sovereign. It comprises his rights, duties, prerogatives, and powers. But with us all power is with the people. They alone are sovereign, and they erect what governments they please, and confer on them such powers as they please. None of these governments are sovereign, in the European sense of the word, all being restrained by written constitutions." *Davis on The Rise and Fall of The Confederate Government, Vol. I, 151-2.*

"The term 'sovereign' or 'sovereignty,'" says Judge Story, "is used in different senses, which often leads to a confusion of ideas, and sometimes to very mischievous and unfounded conclusions." Without any disrespect for Judge Story, or any disparagements of his learning and ability, it may safely be added that he and his disciples have contributed not a little to the increase of this confusion of ideas and the spread of these mischievous and unfounded conclusions. There is no good reason whatever why it should be used in different senses, or why there should be any confusion of ideas as to its meaning. Of all the terms employed in political science, it is one of the most definite and intelligible. The definition of it given by that accurate and lucid publicist, Burlamaqui, is simple and satisfactory—that "sovereignty is a right of commanding in the last resort in civil society." The original seat of this sovereignty he also declares to be in the people. "But," he adds, "when once the people have transferred their right to a sovereign (i. e., a monarch), they can not, without contradiction, be supposed to continue still masters of it." This is in strict accord with the theory of American republicanism, the peculiarity of which is that the people *never do* transfer their right of sovereignty, either in whole or in part. They only delegate to their governments the exercises of such of its functions as may be necessary, subject always to their own control, and to re-assumption whenever such government fails to fulfill the purposes for which it was instituted. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 141.*

That the States were severally sovereign and independent when they were united under the Articles of Confederation, is distinctly asserted in those articles, and is admitted even by the extreme partisans of consolidation. Of right, they are still sovereign, unless they have surrendered or been divested of their sovereignty; and those

who deny the proposition have been vainly called upon to point out the process by which they have divested themselves, or have been divested of it, otherwise than by usurpation.

Since Webster spoke and Story wrote upon the subject, however, the sovereignty of the States has been vehemently denied, or explained away as only a partial, imperfect, mutilated sovereignty. Paradoxical theories of "divided sovereignty" and "delegated sovereignty" have arisen, to create that "confusion of ideas," and engender those "mischievous and unfounded conclusions," of which Judge Story speaks. Confounding the sovereign authority of the *people* with the delegated powers conferred by them upon their *governments*, we hear of a Government of the United States "sovereign within its sphere," and of State governments "sovereign in *their* sphere;" of the surrender by the States of *part* of their sovereignty to the United States, and the like. Now, if there be any one great principle pervading the Federal Constitution, the State Constitutions, the writings of the fathers, the whole American system, as clearly as the sunlight pervades the solar system, it is that *no* government is sovereign—that all governments derive their powers from the people, and exercise them in subjection to the will of the people—not a will expressed in any irregular, lawless, tumultuary manner, but the will of the organized community, expressed through authorized and legitimate channels. The founders of the American republics never conferred, nor intended to confer, sovereignty upon either their State or Federal Governments. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 142.*

"But, indeed," says Mr. Motley, "the words 'sovereign' and 'sovereignty' are purely inapplicable to the American system. In the Declaration of Independence the provinces declare themselves 'free and independent States,' but the men of those days knew that the word 'sovereign' was a term of feudal origin. When their connection with a time-honored feudal monarchy was abruptly severed, the word 'sovereign' had no meaning for us."

If this be true, "the men of those days" had a very extraordinary way of expressing their conviction that the word "had no meaning for us." We have seen that, in the very front of their Articles of Confederation, they set forth the conspicuous declaration that each State retained "its *sovereignty*, freedom, and independence." *Davis on The Rise and Fall of The Confederate Government, Vol. I, 143.*

Mr. Madison, one of the most distinguished of the men of that day and of the advocates of the Constitution, in a speech already once referred to, in the Virginia Convention of 1788, explained that "We, the people," who were to establish the Constitution, were the people of "thirteen SOVEREIGNTIES."

In the "Federalist," he repeatedly employs the term—as, for example, when he says: "Do they (the fundamental principles of the Constitution) require that, in the establishment of the Constitution, the States should be regarded as distinct and independent SOVEREIGNS? They *are* so regarded by the Constitution proposed."

Alexander Hamilton—another contemporary authority, no less illustrious—says, in the "Federalist."

"It is inherent in the nature of *sovereignty*, not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of *sovereignty*, is now enjoyed by the government of every State in the Union."

In the same paragraph he uses these terms, "sovereign" and "sovereignty," repeatedly—always with reference to the States, respectively and severally.

Benjamin Franklin advocated equality of suffrage in the Senate as a means of securing "the *sovereignities* of the individual States." James Wilson, of Pennsylvania, said sovereignty "is in the people before they make a Constitution, and remains in them," described the people as being "thirteen independent *sovereignities*." Gouverneur Morris, who was, as well as Wilson, one of the warmest advocates in the Convention of a strong central government, spoke of the Constitution as "a *compact*," and of the parties to it as "each enjoying sovereign power." Roger Sherman, of Connecticut, declared that the Government "was instituted by a number of *sovereign* States." Oliver Ellsworth, of the same State, spoke of the States as "sovereign bodies." These were all eminent members of the Convention which formed the Constitution. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 143-45.*

### Sovereign Powers of the United States

The powers of the United States are divided into two classes—those exercised beyond their borders and those exercised within their territorial jurisdiction; and these again are subdivided into two, those within the Territories and the District of Columbia and those within the several States. In all external relations and transactions with foreign nations, the sovereignty of the United States is absolute except in so far as it is limited by the express language and implied restrictions of the Constitution. *Foster on the Constitution, Vol. I, p. 270.*

### Sovereign Power—Where Does It Reside?

Mr. Calhoun thus argues against the proposition that sovereignty itself can be divided:

There is no difficulty in understanding how powers, appertaining to sovereignty, may be divided; and *the exercise* of one portion delegated to one set of agents, and other portion to another: or how sovereignty may be vested in one man, or in a few, or in many. But how sovereignty itself—the supreme power—can be divided,—how the people of the several States can be partly sovereign, and partly *not* sovereign—partly supreme, and partly *not* supreme, it is impossible to conceive. Sovereignty is an entire thing; to divide, is,—to destroy it. *1 Calhoun's Works, p. 146.*

Sovereignty is the source of law, *when it was* in the people, they delegated a part of this to the agencies of government, distributed be-

tween the State and Federal governments; their inalienable rights they did not delegate to either, but reserved unto themselves, some of which are enumerated in our bills of right. *118 U. S. 356-70.*

Sovereignty is the rightful political power vested in the body-politic. *Tucker's Const. 11.*

The body-politic is the means ordained to secure the inalienable rights of man. It is legitimate when it promotes and does not destroy. Magistrates are trustees and servants of the people. God delegated the power that governs, but vested the right in man. No government worthy to exist can rightfully deprive the people of their inalienable rights, and essential liberties. *1 Tucker's Const. 13, 17 and notes.*

### **Sovereignty Defined**

The term "sovereignty" denotes the possession of sovereign power or supreme political authority, including paramount control of the constitution and frame of government and its administration. It is the self-sufficient source of political power, from which all specific political powers are derived. It describes the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation. *Black on Constitutional Laws, 18.*

On the internal side, sovereignty implies the power of the state to make and alter its system of government, and to regulate its private affairs, as well as the rights and relations of its citizens, without any dictation, interference, or control on the part of any person or body or state outside the particular political community. Every statute is a manifestation of sovereignty. But where the country is governed under a written constitution, intended to endure against all change except by the solemn expression of the will of the people, the ultimate test of sovereignty must be found in the right and power to alter the constitution of government at will. *Black on Constitutional Laws, 19.*

### **Sovereignty of the People**

In America, sovereignty resides in the people. But the people here are the qualified electors, or a majority of them, and they can exercise their sovereign power only in the modes pointed out by their constitutions. *Black on Constitutional Law, 26.*

### **Sovereignty and Rights of the States**

The several states have not the attribute of sovereignty, except in a limited and qualified sense. They are local self-governing communities, independent as respects each other, independent in a limited and qualified sense as respects the Union, but not ranking as nations or sovereign powers for the purposes of international law. *Black on Constitutional Law, 22.*



**American and English Governments Compared**

The Cabinet system of government is of English origin. It was of slow growth, was not known when the American government was created, and therefore could not have been copied into the American Constitution. It has spread in Europe, but not in America. In time of war, its substitute in America is Presidential government, though in time of peace, we have here neither Cabinet, nor Presidential, but Constitutional, with a practical division of powers, between the two governments, state and federal, and then between the legislative, executive and judicial of each government, and each division or department acting as a check to or a balance against the others, so as to promote and to secure the liberties of all, the minorities as well as the majorities. Excerpts from Mr. Bryce's *American Commonwealth* will clearly show this. He says among many other things: .

The English system on which have been modeled, of course with many variations, the systems of France, Belgium, Holland, Italy, Germany, Hungary (where, however, the English scheme has been compounded with an ancient and very interesting native-born constitution), Sweden, Norway, Denmark, Spain, and Portugal, as well as the constitutions of the great self-governing English colonies in North America and Australia—this English system places at the head of the state a person in whose name all executive acts are done, and who is (except in France) irresponsible and irremovable. His acts are done by the advice and on the responsibility of ministers chosen nominally by him, but really by the representatives of the people—usually, but not necessarily, from among the members of the legislature. The representatives are, therefore, through the agents whom they select, the true government of the country. When the representative assembly ceases to trust these agents, the latter resign, and a new set are appointed. *Bryce's American Commonwealth, Vol. I, 271.*

Under this system the sovereignty of the legislature may be more or less complete. It is most complete in France; least complete in Germany and Prussia, where the power of the Emperor and King is great and not declining. But in all these countries not only are the legislature and executive in close touch with one another, but they settle their disputes without reference to the judiciary. The courts of law cannot be invoked by the executive against the legislative acts which do not come before it, since the legislature is either completely sovereign, as in England, or the judge of its own competence, as in Belgium. The judiciary, in other words, does not enter into the consideration of the political part of the machinery of government.

The system of so-called cabinet government seems to Europeans now, who observe it at work over a large part of the world, an obvious and simple system. We are apt to forget that it was never seen anywhere till the English developed it by slow degrees, and that it



is a very delicate system, depending on habits, traditions, and understandings which are not easily set forth in words, much less transplanted to a new soil. *Bryce's American Commonwealth, Vol. I, 272.*

In 1787, when the Constitutional Convention met at Philadelphia, the Cabinet system of government was in England still immature. It was so immature that its true nature had not been perceived. And although we now can see that the tendency was really towards the depression of the Crown and the exaltation of Parliament, men might well, when they compared the influence of George III, with that exercised by George I, argue in the terms of Dunning's famous resolution, that "the power of the Crown has increased, is increasing, and ought to be diminished." *Bryce's American Commonwealth, Vol. I, 273.*

Montesquieu's treatise was taken by the thinkers of the next generation as a sort of Bible of political philosophy. Hamilton and Madison, the two earliest exponents of the American Constitution they had done so much to create, cite it in the *Federalist* much as the schoolmen cite Aristotle, that is, they cite it as an authority which everybody will recognize to be binding; and Madison, in particular, constantly refers to this separation of the legislative, executive, and judicial powers as the distinguishing note of a free government. *Bryce's American Commonwealth, Vol. I, 276.*

From their colonial experience, coupled with these notions of the British Constitution, the men of 1787 drew three conclusions: Firstly, that the vesting of the executive and legislative powers in different hands was the normal feature of a free government. Secondly, that the power of the executive was dangerous to liberty, and must be kept within well-defined boundaries. Thirdly, that in order to check the head of the state it was necessary not only to define his powers, and appoint him for a limited period, but also to destroy his opportunities of influencing the legislature. Conceiving that ministers, as named by and acting under the orders of the President, would be his instruments rather than faithful representatives of the people, they resolved to prevent them from holding this double character, and therefore forbade "any person holding office under the United States" to be a member of either House. They deemed that in this way they had rendered their legislature pure, independent, vigilant, the servant of the people, the foe of arbitrary power. Omnipotent, however, the framers of the Constitution did not mean to make it. They were sensible of the opposite dangers which might flow from a feeble and dependent executive. The proposal made in the first draft of the Constitution that Congress should elect the President, was abandoned, lest he should be merely its creature and unable to check it. To strengthen his position, and prevent intrigues among members of Congress for this supreme office, it was settled that the people should themselves, through certain electors appointed for the purpose, choose the President. *Bryce's American Commonwealth, Vol. I, 277.*

In England, if the executive ministry displeases the House of Commons, the House passes an adverse vote. The ministry have their choice to resign or to dissolve Parliament. If they resign, a new

ministry is appointed from the party which has proved itself strongest in the House of Commons; and co-operation being restored between the legislature and the executive, public business proceeds. If, on the other hand, the ministry dissolve Parliament, a new Parliament is sent up which, if favorable to the existing cabinet, keeps them in office, if unfavorable, dismisses them forthwith. Accord is in either case restored. *Bryce's American Commonwealth, Vol. I, 281.*

In America a dispute between the President and Congress may arise over an executive act or over a bill. If over an executive act, an appointment or a treaty, one branch of Congress, the Senate, can check the President, that is, can prevent him from doing what he wishes, but cannot make him do what they wish. If over a bill which the President has returned to Congress unsigned, the two Houses can, by a two-thirds majority, pass it over his veto, and so end the quarrel; though the carrying out of the bill in its details must be left to him and his ministers, whose dislike of it may render them unwilling and therefore unsuitable agents. *Bryce's American Commonwealth, Vol. I, 282.*

There exists between England and the United States a difference which is full of interest. In England the legislative branch has become supreme, and it is considered by Englishmen a merit in their system that the practical executive of the country is directly responsible to the House of Commons. In the United States, however, not only in the national government, but in every one of the States, the exactly opposite theory is proceeded upon—that the executive should be wholly independent of the legislative branch. Americans understand that this scheme involves a loss of power and efficiency, but they believe that it makes greatly for safety in a popular government. They expect the executive and the legislature to work together as well as they can, and public opinion does usually compel a degree of co-operation and efficiency which perhaps could not be expected theoretically. It is an interesting commentary on the tendencies of democratic government, that in America reliance is coming to be placed more and more, in the nation, in the State, and in the city, upon the veto of the Executive as a protection to the community against legislative branch. Weak Executives frequently do harm, but a strong Executive has rarely abused popular confidence. On the other hand, instances where the Executive, by the use of his veto power, has arrested mischiefs due to the action of the legislature are by no means rare. This circumstance leads some Americans to believe that the day is not far distant when in England some sort of veto power, or other constitutional safe-guard must be interposed to protect the people against their Parliament. *Bryce's American Commonwealth, Vol. I, 283.*

It is another and a remarkable consequence of the absence of cabinet government in America, that there is also no party government in the European sense. Party government in France, Italy, and England means, that one set of men, united, or professing to be united, by holding one set of opinions, have obtained control of the whole machinery of government, and are working it in conformity with those opinions. Their majority in the country is represented by a majority

in the legislature, and to this majority the ministry of necessity belongs. The ministry is the supreme committee of the party, and controls all the foreign as well as domestic affairs of the nation, because the majority is deemed to be the nation. It is otherwise in America. Men do, no doubt, talk of one party as being "in power," meaning thereby the party to which the President belongs. But they do so because that party enjoys the spoils of office, in which to so many politicians the value of power consists. They do so also because in the early days the party prevailing in the legislative usually prevailed also in the executive department, and because the presidential election was, and still is, the main struggle which proclaimed the predominance of one or other party. *Bryce's American Commonwealth, Vol. I, 285.*

There is in the American government, considered as a whole, a want of unity. Its branches are unconnected; their efforts are not directed to one arm, do not produce one harmonious result. *Bryce's American Commonwealth, Vol. I, 287.*

A President can do little, for he does not lead either Congress or the nation. Congress cannot guide or stimulate the President, nor replace him by a man fitter for the emergency. The Cabinet neither receive a policy from Congress nor give one to it. Each power in the state goes its own way, or wastes precious moments in discussing which way it shall go, and that which comes to pass seems to be a result not of the action of the legal organs of the state, but of some larger force which at one time uses their discord as it means, at another neglects them altogether. *Bryce's American Commonwealth, Vol. I, 288.*

The English Constitution, which we admire as a masterpiece of delicate equipoises and complicated mechanism, would anywhere but in England be full of difficulties and dangers. It stands and prospers in virtue of the traditions that still live among English statesmen and the reverence that has ruled English citizens. It works by a body of understandings which no writer can formulate, and of habits which centuries have been needed to instil. So the American people have a practical aptitude for politics, a clearness of vision and capacity for self-control never equalled by any other nation. In 1861 they brushed aside their darling legalities, allowed the executive to exert novel powers, passed lightly laws whose constitutionality remains doubtful, raised an enormous army, and contracted a prodigious debt. Romans could not have been more energetic in their sense of civic duty, nor more trustful to their magistrates. When the emergency had passed away the torrent which had overspread the plain fell back at once into its safe and well-worn channel. The reign of legality returned; and only four years after the power of the executive had reached its highest point in the hands of President Lincoln, it was reduced to its lowest point in those of President Johnson. Such a people can work any Constitution. The danger for them is that this reliance on their skill and their star may make them heedless of the faults of their political machinery, slow to devise improvements which are best applied in quiet times. *Bryce's American Commonwealth, Vol. I, 290.*

The power of the courts to enforce the limitations upon the prerogative of the crown was therefore a conception familiar to the minds of American lawyers long before the Revolution. The power of the courts to enforce limitations upon the power of a national legislature was not yet recognized. Blackstone had familiarized them with the doctrine of the omnipotence to Parliament. The maxim that it could do everything except to *make a man a woman and a woman a man*<sup>1</sup> was as trite a quotation then as now. Yet successive steps in human progress had not only shown the necessity but suggested the practicability of such a practice. Under the Tudors and Stuarts the doctrine of the divine right of kings was not only preached from the pulpit but argued at the bar. The crown lawyers contended that Parliament could not, even with the consent of the king, shear the crown of its essential prerogatives. The king had no power to thus deprive his successors of their birthrights. He had not even the right to himself abandon a trust reposed in him by God. These claims of the prerogative of the crown, were among the sources of the idea of a prerogative of the people.

Although no court was so bold as to set aside an act of Parliament, we find a few judicial sayings that an act of Parliament against common right would be void. *Foster on the Constitution, Vol. 1, p. 31.*

### Parliament and Congress Compared

The House of Lords is the hereditary branch of England's government, while the Senate of the United States is elective. Senators are elected by the respective States, each State electing two. Formerly they were elected by the State legislatures on a joint ballot of the two houses; they may now be elected by direct vote of the people of the whole State. The two Senators from the State, in theory represent the State in the National legislature, and not the people of the United States. This distinction seems to have been lost sight of, and some of the greatest United States Senators have refused to vote the expressed will of their States, voting what they claimed to be the will of the United States. Congressmen, members of the lower house, do theoretically represent the people of the United States and not the people of their State, or the district which elects them. This distinction is also in practice lost sight of, the Congressman more so than the Senator votes the wishes of those who elect him. The lords do not vote the wishes of anybody. They act as lock chains, or breaks, but not a steering wheel or motive power. Mr. Bagehot thus describes the House of Lords:

<sup>1</sup>There now seems to be many who are so progressive that they would have the Constitution be nearer omnipotent than the English Parliament,

that is, they would so amend it as to abolish all distinctions between the sexes as to governmental offices.



The House of Lords, being an hereditary chamber, cannot be of more than common ability. It may contain,—it almost always has contained, it almost always will contain—extraordinary men. But its average born law-makers cannot be extraordinary. Being a set of eldest sons picked out by chance and history, it cannot be very wise. It would be a standing miracle if such a chamber possessed a knowledge of its age superior to the other men of the age; if it possessed a superior and supplemental knowledge; if it described what they did not discern, and saw truly that which they saw, indeed, but saw untruly. *Bagehot in The Federalist, Vol. II, Number IV, on The English Constitution.*

Not only does the House of Lords do its work imperfectly, but often, at least, it does it timidly. Being only a section of the nation, it is afraid of the nation. Having been used for years and years, on the greatest matters to act contrary to its own judgment, it hardly knows when to act on that judgment. The depressing languor with which it damps an earnest young Peer is at times ridiculous. *Bagehot in The Federalist, Vol. II, Number IV, on The English Constitution.*

The danger of the House of Commons is, perhaps, that it will be reformed too rashly; the danger of the House of Lords certainly is, that it may never be reformed. Nobody asks that it should be so; it is quite safe against rough destruction, but it is not safe against inward decay. It may lose its veto as the Crown has lost its veto. If most of its members neglect their duties, if all its members continue to be of one class, and that not quite the best; if its doors are shut against genius that cannot found a family, and ability which has not five thousand a year, its power will be less year by year, and at last be gone, as so much kingly power is gone—no one knows how. Its danger is not in assassination, but atrophy; not abolition, but decline. *Bagehot in The Federalist, Vol. II, Number IV, on The English Constitution.*

### Cabinet and Presidential Government

Bagehot has written a very interesting book on this subject. He claims that England is a Cabinet Government, while the United States is a Presidential Government. He is right as to England, and wrong as to the United States, except in time of war, then he is right as to the United States. His acquaintance with the American government seems to have been limited to the time of the war between the States, and just preceding and following. He certainly describes its true character, in this respect, only during war. One feature of the two governments he does describe well, that is as to the checks and balances of powers. As he says, the divisions of the powers of the government into the three great divisions, legislative, executive and judicial and the bicameral legislature. It is generally stated and believed that the United States copied these from the English government. Bagehot



says, England has no such government in principle or practice. He says the Americans in 1787 thought they were copying the English Constitution in this respect, but they were contriving a contrast to it.

He says, just as America is the type of the government which divides the powers among many bodies and functionaries, England is the type which consolidates all these three powers into the hands of the same persons and functionaries. That the division in England is in name and form only, to give dignity to the government, but in truth and in practice, all the ultimate powers of the government are in one body. He says that the unlimited power of the English government is in the newly elected House of Commons. That its power, whether legislative, executive, judicial or administrative, is supreme and despotic. He shows in parts of his book, that the absolute power resides in the Cabinet which the House of Commons elect and he might add that it could further be reduced, or consolidated, into the last elected or named prime minister, who is the real director, dictator and ruler of England. It is he and he only whose will must be done. He is to England, in war and peace, what the President of the United States is in time of war. The American government in time of war is very much like the English government, in that all power is then exercised by one man. In theory, it is not, but in practice it is.

There is one power, however, that the President has never attempted to control even during war, and probably could not if he should, that is the judicial power. While he appoints the judges in time of peace and in time of war, they are appointed for life, and are independent, and their functions are the same in war or in peace. So far as the legislative and executive departments of the government are concerned, in practice, the Constitution is one thing in war and another in peace. In time of war it seems impracticable to observe the Constitutional divisions and limitations of the Sovereign powers, even as between the States and the United States, or as between Congress and the President. Congress and the majority of the people surrender all of their rights and powers to the President, and say his will be done. Congress, during war, is nothing more than a rubber stamp to counter-sign and pass the laws the President requests. He has no occasion

then to veto bills, because none are passed, which he or his Cabinet did not originate or approve, and they often draft them and they are enacted substantially as drafted.

Members of either house who dare oppose them are proclaimed by the public press as being disloyal pacifists, sympathizing with the enemy, and sometimes called traitors. Obstructions in time of war are not tolerated even by the people. If the country is at war, the war measures must be supported. Members of Congress must not then have opinions or wills, they must enact into law all measures which the administration requests. Of course, the President has no power of compelling them to enact the laws he proposes but public opinion sanctions the course of the President, and this opinion seems to be shared by most all Congressmen. This support on the part of Congress is not always from fear of being defeated for re-election or of impeachment, or of public censure by the press, which supports the President, but the members of Congress seem to view the matter as do the people, that necessity requires it, and it knows no law.

Of course, the President could go to such extremes that Congress nor the people would not support him, but he never has yet reached such extremes and probably never will. The President has no motive to go to extreme military ends further than is necessary to win the war; and to this end, Congress and the people will of course support him. England's Constitution, if such it can be called, is to center all power in one sovereign body, and then further, center that in one head, the prime minister, who styles his own acts and wills as that of the government, in war and in peace. The American Constitution, which is in theory and in practice, a Constitution during peace, but not in time of war, except in theory, is founded upon the principle of having many sovereign authorities and so dividing these sovereign powers as to give each a check upon the other and to make each balance another. In time of war, however, the belts are thrown off the wheels that move the centrifugal forces, and all power tends toward the center, which is the President. The American government is planned for peace, while others are planned for war. The American government in time of peace is a government of laws and not of men. Others are governments of men and not of laws.

The American Constitution is founded on the principle of securing the liberty of the people as well as the strength of

the government. The laws of the country secure the liberty of the people. No power but that of the people can change the laws so as to destroy the liberties. All men are subject to the law, no man is above the law. The fundamentals of the law, that is the Constitution, these principles which pertain to government and liberty, are written certain and attainable. Those of other countries are unwritten, uncertain and unknowable; they are traditions, customs and histories of the wills, whims and wishes of men who have been by chance or design selected as rulers and sovereigns, and these are not fixed or binding upon the present rulers. They may follow or disregard them in part or in toto. They are therefore governments of men and not of laws.

One advantage the English government possesses over the American and of any other government, is that peaceable revolutions are there more easily obtained than in any other government. While there is provided in the American government means by which the form of government may be changed by amending the Constitution or forming a new one, it is not so easily or quickly done as in England. The war between the States was the result of the difficulty of changing the Constitution which left the institution of slavery to the control of the States. It required a revolution by force to change the Constitution and form of government in this respect. If the Constitution could have been amended in this respect peaceably, as provided in the Constitution, there would have been no secession and no war between the States. That the Constitution had to be amended in this respect after the war was to say the best of it, proof that the Southern States were the ones which sought to stand by the Constitution and the Northern States were seeking to deprive them of their Constitutional rights. If the Northern States had been right in their contentions, there would have been no need to amend the Constitution after the war as to slavery. Congress, and the Federal Government, though composed of the Northern States only, and in charge of all the powers of the three departments, found it impossible to enforce the claims of the Northern States, without amending the Constitution.

Two fundamental changes in the Constitution of the United States are now being proposed. They each profess to change the form of government pro tanto. One is known as the prohibition amendment. It proposes to take away from the States their police power as to the regulations of intoxicating liquors

as a beverage and prohibit the people of the United States from manufacturing, selling or using intoxicating liquors as a beverage.

The other is known as the Susan B. Anthony Amendment, which proposes to take away from the States the power to discriminate against females in the exercise of the right to vote. In other words, to this extent, to take away from the States the right and further fix the qualifications of voters in all elections. These are without doubt the most radical changes ever proposed to the Federal Constitution. Neither would have had a shadow of chance of adoption if proposed in the Constitutional Convention, or within the first century of our Constitution. An act passed at the first or second Congress of the United States, which imposed a license or tax on intoxicating liquors, produced a revolution in Pennsylvania and a threatened one in other States. These States then denied the right of the Federal Government to even tax intoxicating liquors or the transportation thereof.

As to whether Federal Government should be given the right to fix the qualifications of voters, who were to elect members of the House, was much discussed in the Constitutional Convention. The result was that the power was expressly declared to reside in the States, and it should be in those only whom the States authorized to vote for members of the lower house of the legislature of the respective States. Federal Constitution, Article 1, Section 2, Clause 1. Mr. Hamilton and Mr. Madison, one or both discusses reasons that led to the adoption of the above Constitutional provision in the fifty-second number of *The Federalist*. It is worthy of study to-day before we make the proposed change. The question as to the right of women to vote is not new in the United States. Women voted in Pennsylvania and New Jersey when Thomas Jefferson was first elected President in 1800; but have not voted much there since.

In England, practically speaking, the laws, whether constitutional or statutory, whether pertaining to the government or people, are made and unmade by the Cabinet. The Constitution and therefore the form of government can be changed just as quickly and just as easily as the statutory law can be changed. In the United States, practically speaking, the statutory laws, as for the Federal Government, are made and unmade by committees of the two houses of Congress. This rule, however, is not without exceptions; the bills



proposed or approved by the committees do not always pass. The Constitutional law, however, so far as the Federal Government is concerned, is made and unmade, only by the States or the people thereof. Neither a majority of the States nor of all the people thereof, can change the Federal Constitution. Such majorities cannot even propose, much less effect a change. It is possible that three-fourths of the people of the United States could not even propose an amendment to the Constitution. Changes therefore in the form of government are difficult, and hence may lead to violent revolution, but tend greatly to stability in the form of government.

In England a Constitutional provision is no more secure or supreme than an ordinary statute or ordinance. In the United States a Constitutional law is secured from the touch of Congress. The people thereof alone can change it and then only in the mode provided for in the Constitution.

In the United States, no federal law can be enacted or changed without the approval of both houses, the Senate and the lower House. Either house has a perfect veto power upon the other. Except as to a few subjects, revenue, taxation, etc., either house may originate or propose bills. In England, the House only proposes and enacts, the House of Lords have only a quasi veto that acts mostly as a break or check to hasty or ill considered legislation, but cannot prevent. In the United States, the President has an absolute veto against a bare majority of both houses, and a partial or quasi veto against both houses. That is if he vetoes a measure, it must go back to both houses by two-thirds majority. Consequently unless two-thirds of the members of both houses favor the measure, the President can prevent its enactment into law, but with this majority, Congress' will is the statutory law on the subject. Just as a majority of the House of Commons is English law whether Constitutional or otherwise, unless the Cabinet orders another.

While England, in theory, has a monarchial government and a hereditary one at that; in practice, the monarch possesses but few governmental powers or functions. Once upon a time he was a real king, in theory and practice. His will was law, but this power has long since been taken away from him. One by one, his powers have left him, until now, he has but little, if any, influence in the control of the government, in war or peace. Once, it was said and believed he could do no wrong and was not subject to the law of England, but



above it. Now the King of England must, according to the law of England, sign his own death warrant, if the two houses of Parliament send it up to him. (*Bagehot's English Constitution.*) The author, however, yet contends that the king is a necessary and useful part of the Government, and that his presence, and office, makes the English Constitution better than those of Republics. His argument is that the King adds dignity, reverence and respect to the government. He is by the author said to be the theatrical part, though he performs no functions, other than social and sentimental. He has nothing to do with the making, executing, or administering the laws otherwise than as purely pro forma. A rubber stamp operated by a machine would serve the same purpose.

The love of kings is purely sentimental and is fast passing away. The next century will know them only as part of Ancient History. Why statesmen and philosophers should take a pride in claiming to be ruled and governed by an idealistic king is difficult for American-born people to understand. At one time it was said that every crowned head in Europe was idiotic. Mr. Bagehot says this is not wholly true, but that it approaches the truth. Mr. Adams and Mr. Jefferson agreed that of the crowned heads of their acquaintance, only one was above mediocre and many of them idiotic. George III. used to read all documents before he signed them. Lord Thurlow told him "it was nonsense, his looking at them, because he could not understand them."

Mr. Bagehot thus describes some recent reigns in England:

If we look at history, we shall find that it is only during the period of the present reign that in England the duties of a constitutional sovereign have ever been well performed. The first two Georges were ignorant of English affairs, and wholly unable to guide them, whether well or ill; for many years in their time the Prime Minister had, over and above the labor of managing Parliament, to manage the woman—sometimes the queen, sometimes the mistress—who managed the sovereign; George III. interfered unceasingly, but he did harm unceasingly; George IV. and William IV. had no steady continuing guidance, and were unfit to give it. *Bagehot on The English Constitution, Vol. II, The Federalist, Number III.*

It has been a surprise to many Americans that England yet holds on to her monarchical form of government. For nearly a century it has been a monarchy in form only. The government has been all the while changing; one by one all the powers and functions that are at all real or sovereign have been taken from the Crown. A few rights which the ordinary citi-

zen does not possess are still left and reserved, and a few acts and ceremonials are still required to be performed by the Crown. They are, however, merely perfunctory and could as easily be performed without as with a Crown.

A half century ago Mr. Bagehot said that the chief functions of the Crown and House of Lords were that they gave dignity and respect to the government and added a theatrical air or appearance to governmental affairs. The evolution has continued in the same direction which he described in his *English Constitution* until it is doubted if they now perform these functions to such an extent as to render them any longer necessary appendages.

It is now probable that their functions in the government are much like the appendix and tonsils of the human body, very liable to cause disease and their removal would add to the general health and vigor of the government. As it is now becoming popular for those who can pay the price to have the appendix and tonsils removed, it will no doubt become popular to remove such useless appendages from the government. One effect of the great world war now going on will be to apply the surgeon's knife to many if not all those useless and troublesome appendages to Civil Government.

It is said that the war is being waged to make the world safe for democracy. It can never be safe so long as more than half the world is ruled by a monarch, whether he be King, Emperor or Czar. In England the king has no power; in Prussia, he has all, not only of Prussia, but of the whole German Empire. In theory he has not but in practice he has. The same was true of Russia until the government was destroyed by a violent revolution. So it will be with Prussia, and the German Empire. The people must rule, and monarchy is doomed, and the world will be rid of one of the greatest causes and sources of wars.

Republics and Democracies may and do have wars, but they are not so apt so to do, as monarchies or aristocracies. In theory, of course, there are now very few if any absolute monarchies, yet where the powers are vested in some other men or body of men, when the monarch controls, the government is just as bad or worse, than if it were in theory and in fact an absolute monarchy.

In the British Government the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate. The representatives of the people in the Legislature are

not only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the Executive. Hence it is a principle, that the Parliament is unlimited in its power; or, in their own language, is omnipotent. Hence, too, all the ramparts for protecting the rights of the people—such as their Magna Charta, their Bill of Rights, etc.—are not reared against the Parliament, but against the royal prerogative. They are merely legislative precautions against executive usurpations. Under such a government as this, an exemption of the press from previous restraint, by licensers appointed by the King, is all the freedom that can be secured to it.

In the United States the case is altogether different. The People, not the Government, possess the absolute sovereignty. The Legislature, no less than the Executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by the constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licensers, but from the subsequent penalty of laws. *4 Writings of Madison, p. 542-543.*

### **American Government Distinguished From Others**

Two distinguishing features of American Government are as follows: It first discarded the theory now admitted by the world to be fallacious and fictitious, called the Divine Right of Kings, and denied that the right of one to govern others is either divine, descendible, or hereditary. It declared and adopted the theory, now almost universally accepted, that the people themselves are the true and real sovereigns, that Nature endowed each with natural rights and that some are inalienable, that governments are or should be founded by the people alienating or granting to the government some of these rights for the better protection of all, and to guarantee the maintenance and protection of others that are inalienable to each and to all; that governments have or should have these rights and powers only which the people grant to them; that it is not the proper functions of governments to grant rights and powers to the people, but to receive such rights from the people, and then exercise the rights and powers so granted, to protect the people in the enjoyment of those rights and principles not granted, not only against the government itself so created, but against themselves who created it. A govern-

ment is created by the people just as the people are created by Nature. The creature ought not to be more powerful than the creator.

Other distinguishing features of the American Government is that it divides the government to be created into two parts, one local or domestic and the other general or foreign; one called the State, the other United States. The powers granted by the people to these respective parts are granted to each respectively, and as granted to the one, are denied to the other, except as to a few rights and powers which are granted to both with certain limitations thereon, that the powers shall be exercised only for certain purposes. Each of these two great parts are again subdivided into three parts, and certain rights and powers granted to each of these subdivisions are denied to the others. Our forefathers were not willing to put all their eggs in one basket. They knew it was human nature to abuse power, that power is the only check against power. They therefore made each power granted a check upon some other power granted, and thus secured stability and permanency.

The English system on which have been modeled, of course with many variations, the system of France, Belgium, Holland, Italy, Germany, Hungary (where, however, the English scheme has been compounded with an ancient and very interesting native-born constitution), Sweden, Norway, Spain, Denmark, and Portugal, as well as the constitutions of the great self-governing English colonies in North America and Australia—this system placed at the head of the state a person in whose name all executive acts are done, and who is (except in France) irresponsible and irremovable. His acts are done by the advice and on the responsibility of ministers chosen nominally by him, but really by the representative of the people—usually, but not necessarily, from among the members of the legislature. *Bryce's American Commonwealth, Vol. I, 271.*

In 1787, when the Constitutional Convention met at Philadelphia, the Cabinet system of government was in England still immature. It was so immature that its true nature had not been perceived. And although we now can see that the tendency was really towards the depression of the Crown and the exaltation of Parliament, men might well, when they compared the influence of George III., with that exercised by George I., argue in the terms of Dunning's famous resolution, that "the power of the Crown has increased, is increasing, and ought to be diminished." *Bryce's American Commonwealth, Vol. I, 273.*

Montesquieu's treatise was taken by the thinkers of the next generation as a sort of Bible of political philosophy. Hamilton and Madison, the two earliest exponents of the American Constitution they had done so much to create, cite it in the *Federalist* much as the



schoolmen cite Aristotle, that is, they cite it as an authority which everybody will recognize to be binding; and Madison in particular constantly refers to this separation of the legislative, executive, and judicial powers as the distinguishing note of a free government. *Bryce's American Commonwealth, Vol. I, 276.*

From their colonial experience, coupled with these notions of the British Constitution, the men of 1787 drew three conclusions: Firstly, that the vesting of the executive and the legislative powers in different hands was the normal and natural feature of a free government. Secondly, that the power of the executive was dangerous to liberty, and must be kept within the well-defined boundaries. Thirdly, that in order to check the head of the state it was necessary not only to define his powers, and appoint him for a limited period, but also to destroy his opportunities of influencing the legislature. Conceiving that ministers, as named by and acting under the orders of the President, would be his instrument rather than faithful representatives of the people, they resolved to prevent them from holding this double character, and therefore forbade "any person holding office under the United States" to be a member of either House. They deemed that in this way they had rendered their legislature pure, independent, vigilant, the servant of the people, the foe of arbitrary power. Omnipotent, however, the framers of the Constitution did not mean to take it. They were sensible of the opposite dangers which might follow from a feeble and dependent executive. The proposal made in the first draft of the Constitution that Congress should elect the President, was abandoned, lest he should be merely its creature and unable to check it. To strengthen his position, and prevent intrigues among members of Congress for this supreme office, it was settled that the people should themselves, through certain electors appointed for the purpose, choose the President. *Bryce's American Commonwealth, Vol. I, 277.*

The House is strong, because it can call the ministry to account for every act, and can, by refusing supplies, compel their resignation. The ministry are not defenseless, because they can dissolve Parliament, and ask the people to judge between it and them. Parliament, when it displaces a ministry, does not strike at executive authority: it merely changes its agent. The ministry, when they dissolve Parliament, do not attack Parliament as an institution: they recognize the supremacy of the body in asking the country to change the individuals who compose it. Both the House of Commons and the ministry act and move in full view of the people, who sit as arbiters, prepared to judge in any controversy that may arise. The House is in touch with the people, because every member must watch the lights and shadows of sentiment which play over his own constituency. The ministry are in touch with the people, because they are not only themselves representatives, but are heads of a great party, sensitive to its feelings, forced to weigh the effect of every act they do upon the confidence which their party places in them. *Bryce's American Commonwealth, Vol. I, 280.*

In England, if the executive ministry displaces the House of Commons, the House passes an adverse vote. The ministry have their



choice to resign or to dissolve Parliament. If they resign, a new ministry is appointed from the party which has proved itself strongest in the House of Commons; and co-operation being restored between the legislature and the executive, public business proceeds. If, on the other hand, the ministry dissolve Parliament, a new Parliament is sent up which, if favorable to the existing cabinet, keeps them in office, if unfavorable, dismisses them forthwith. Accord is in either case restored. *Bryce's American Commonwealth, Vol. I, 281.*

In America a dispute between the President and Congress may arise over an executive act or over a bill. If over an executive act, an appointment or a treaty, one branch of Congress, the Senate, can check the President, that is, can prevent him from doing what he wishes, but cannot make him do what they wish. If over a bill which the President has returned to Congress, unsigned, the two Houses can, by a two-thirds majority, pass it over his veto, and so end the quarrel; though the carrying out of the bill in its details must be left to him and his ministers, whose dislike of it may render unwilling and therefore unsuitable agents. *Bryce's American Commonwealth, Vol. I, 282.*

There exists between England and the United States a difference which is full of interest. In England the legislative branch has become supreme, and it is considered by Englishmen a merit in their system that the practical executive of the country is directly responsible to the House of Commons. In the United States, however, not only in the national government, but in every one of the States, the exactly opposite theory is proceeded upon—that the executive should be wholly independent of the legislative branch. Americans understand that this scheme involves a loss of power and efficiency, but they believe that it makes greatly for safety in a popular government. They expect the executive and the legislature to work together as well as they can, and public opinion does usually compel a degree of co-operation and efficiency which perhaps could not be expected theoretically. It is an interesting commentary on the tendencies of democratic government, that in America reliance is coming to be placed more and more, in the nation, in the state, and in the city, upon the vote of the Executive as a protection to the community against the legislative branch. Weak Executives frequently do harm, but a strong Executive has rarely abused popular confidence. On the other hand, instances where the Executive, by the use of his veto power, has arrested mischiefs due to the action of the legislature are by no means rare. This circumstance leads some Americans to believe that the day is not far distant when in England some sort of veto power, or other constitutional safeguard, must be interposed to protect the people against their Parliament. *Bryce's American Commonwealth, Vol. I, 283.*

### Party Government

It is another and remarkable consequence of the absence of cabinet government in America that there is also no party government in the European sense. Party government in France, Italy, and England means, that one set of men, united, or professing to be united, by

holding one set of opinions, have obtained control of the whole machinery of government, and are working it in conformity with those opinions. Their majority in the country is represented by a majority in the legislature, and to this majority the ministry of necessity belongs. The ministry is the supreme committee of the party, and controls all the foreign as well as domestic affairs of the nation, because the majority is deemed to be the nation. It is otherwise in America. Men, no doubt, do talk of one party as being "in power," meaning thereby the party to which the then President belongs. But they do so because that party enjoys the spoils of office, in which to so many politicians the value of power consists. They do so also because in the early days the party which prevailed in the legislative usually prevailed also in the executive department, and because the presidential election was, and still is, the main struggle which proclaimed the predominance of one of other party. *Bryce's American Commonwealth, Vol. I, 285.*

There is in the American government, considered as a whole, a want of unity. Its branches are unconnected; their efforts are not directed to one aim, do not produce one harmonious result. *Bryce's American Commonwealth, Vol. I, 287.*

A President can do little, for he does not lead either Congress or the nation. Congress cannot guide or stimulate the President, nor replace him by a man fitter for the emergency. The Cabinet neither receive a policy from Congress nor give one to it. Each power in the state goes its own way, or wastes precious moments in discussing which way it shall go, and that which comes to pass seems to be a result not of the action of the legal organs of the state, but of some larger force which at one time uses their discord as it means, at another neglects them altogether. *Bryce's American Commonwealth, Vol. I, 288.*

The English Constitution, which we admire as a masterpiece of delicate equipoises and complicated mechanism, would anywhere but in England be full of difficulties and dangers. It stands and prospers in virtue of the traditions that still live among English statesmen and the reverence that had ruled English citizens. It works by a body of understandings which no writer can formulate, and of habits which centuries have been needed to instill. So the American people have a practical aptitude for politics, a clearness of vision and capacity for self-control never equalled by any other nation. In 1861 they brushed aside their darling legalities, allowed the executive to exert novel powers, passed lightly laws whose constitutionality remains in doubt. Romans could not have been more energetic in their sense of civic duty nor more trustful to their magistrates. When the emergency had passed away the torrent which had overspread the plain fell back at once into its safe and well-worn channel. The reign of legality returned; and only four years after the power of the executive had reached its highest point in the hands of President Lincoln, it was reduced to its lowest point in those of President Johnson. Such a people can work any Constitution. The danger for them is that this reliance on their skill and their star may make them

heedless of the faults of their political machinery, slow to devise improvements which are best applied in quiet times. *Bryce's American Commonwealth, Vol. I, 290.*

Any European student of politics who wishes to understand the problem of government in the United States, whether of city or any other form of government, must first of all transfer himself, if he can, to a point of view precisely the opposite of that which is natural to him. This is scarcely, if at all, less true of the English than of the continental student. In England as upon the continent, from time immemorial, government has descended from the top down. Until recently, society has accepted the ideal in Europe, almost without protest, that there must be governing classes, and that the great majority of men must be governed. In the United States that idea does not obtain, and, what is of scarcely less importance, it never has obtained. No distinction is recognized between governing and governed classes, and the problem of government is conceived to be this, that the whole of society should learn and apply to itself the art of government. Bearing this in mind, it becomes apparent that the immense tide of immigration into the United States is a continually disturbing factor. The immigrants come from many countries, a very large proportion of them being of the classes which, in their old homes, from time out of mind, have been governed. Arriving in America, they shortly become citizens in a society which undertakes to govern itself. However well-disposed they may be as a rule, they have not had experience in self-government, nor do they always share the ideas which have expressed themselves in the Constitution of the United States. This foreign element settles largely in the cities of the country. *Bryce's American Commonwealth, Vol. I, 620-1.*

The House of Commons is like the lower House of Representatives, an elective body. The English, unlike the American house, is not elected to make laws, but to elect the cabinet, which is the real sovereign and which, in fact, makes and un-makes the laws, Constitutional and Statutory. The members of the House of Commons serve as the American Presidential electors. They are to choose the men who not only are to administer the government, but may change the form of government. The house, however, elects whom it chooses, not whom it was elected to choose. It only chooses those whom it thinks the nation will follow. The House of Commons does not rule England; but it does elect those who do, that is the Cabinet. The majority of Parliament support whatever certain leaders support and these leaders are members of the Cabinet and support whatever the Cabinet advises.

"In matters of government," says Judge Cooley, "America has become the leader and the example for all enlightened nations. England and France alike look across the oceans for lessons which may form and guide their people. Italy and Spain follow more distantly;

and the liberty-loving people of every country take courage from American freedom, and find augury of better days for themselves from American prosperity. But America is not so much an example in her liberty as in the covenanted and enduring securities which are intended to prevent liberty degenerating into license, and to establish a feeling of trust and repose under a beneficent government, whose excellence, so obvious in its freedom, is still more conspicuous in its careful provision for permanence and stability.

"Every European state has to fear not only the rivalry but the aggression of its neighbors. Even Britain, so long safe in her insular home, has lost some of her security by the growth of steam navies, and has in her Indian and colonial possessions given pledges to Fortune all over the globe. She, like the Powers of the European Continent, must maintain her system of government in full efficiency for war as well as for peace, and cannot afford to let her arguments decline, her finances become disordered, the vigor of her executive authority be impaired, sources of internal discord continue to prey upon her vitals. But America lives in a world of her own, *ipsa suis pollens opibus, nihil indiga nostri*. Safe from attack, safe even from menace, she hears from afar the warring cries of European races and faiths, as the gods of Epicurus listened to the murmurs of the unhappy earth spread out beneath their golden dwellings." *Bryce's American Commonwealth, Vol. I, 302-3.*

Were George Washington to return to earth, he might be as great and useful a President as he was a century ago. Neither the legislature nor the executive has for a moment threatened the liberties of the people. The States have not broken up the Union, and the Union has not absorbed the States. No wonder that the Americans are proud of an instrument under which this great result has been attained, which has passed unscathed through the furnace of civil war, which has been found capable of embracing a body of commonwealths, three times as numerous, and with twenty-fold the population of the original States, which has cultivated the political intelligence of the masses to a point reached in no other country, which has fostered and been found compatible with a larger measure of local self-government than has existed elsewhere. Nor is it the least of its merits to have made itself beloved. *Bryce's American Commonwealth, Vol. I, 304.*

Compare the criminal laws of England and other Eastern countries with those instituted and promoted by our written Constitutional and dual Government. Judge Dillon, in a lecture, has done this. He says:

Sir James Mackintosh in 1819, in moving in Parliament for a committee to inquire into the condition of the criminal law, stated that there were then "two hundred capital felonies on the statute book." Undoubtedly this apparent severity, for the reasons stated by Sir James Stephen, is greater than the real severity, since many of the offences made capital were of infrequent occurrence; and juries, moreover, often refused to convict, and persons capitally convicted for offences of minor degrees of guilt were usually pardoned on condition of transportation to the American and afterwards the Austra-



lian colonies. But this learned author admits that, "after making all deductions on these grounds, there can be no doubt that the legislation of the eighteenth century in criminal matters was severe to the highest degree, and destitute of any sort of principle or system." *The Laws and Jurisprudence of England and America*, 366.

The Edinburgh Review censuring, in 1826, the injustice of denying prisoners accused of felony the right to be defended by counsel, declared, "The judges and Parliament would have gone on to this day, hanging by wholesale for forgeries of bank notes, if juries had not become weary of continual butchery and resolved to acquit." And the writer added these words,—and each of which legislators should "weigh like a diamond:" "The proper execution of the laws must always depend in a great measure upon public opinion; and it is undoubtedly most discreditable to any man intrusted with power, when the governed turn around upon their governors, and say, 'Your laws are so cruel, or so foolish, we cannot and *will not* obey them.'"

Hallam, writing about the year 1818, says: "A convicted criminal is at present the stricken deer of society, in whose disgrace his kindred shrink from participating, and whose memory they strive to forget." *The Laws and Jurisprudence of England and America*, 267.

The severity of the English criminal law, in addition to its injustice to the prisoner, was productive of two evil consequences of great moment, one of which operated on juries and the other on the judges. Where the penalties were disproportionately severe, the humanity of juries often led them, by what Blackstone calls "pious perjuries," to acquit in cases where the prisoner's guilt was clear. The same consideration operated with the judges, who mercifully allowed defendants to escape on such fine-spun technical objections to indictments, and frivolous variances, as made criminal trials seem like a game of chance or a judicial farce. "Such scandals," says Sir James Stephen, "do not seem to have been unpopular. Indeed, I have some doubt whether they were not popular, as they did mitigate, though in an irrational, capricious manner, the severity of the old criminal law." *The Laws and Jurisprudence of England and America*, 368-9.

### Division of Powers

England professes to have a division of powers, and their execution entrusted to separate sets of persons. This is true in theory only; in practice, there is no such division or separation of powers, either in times of peace or war. In America, in times of peace, the separation and division is both in theory and practice; in time of war, it is like England, only in theory. Then the President exercises or directs the exercise of all powers, except the Judicial, which so far is always independent, except, as to Habeas Corpus proceedings. In England, checks and balances exist in theory only; in practice there is none. In America, they exist during peace both in theory and practice; during war, they exist to a very limited extent and



almost disappear. In England, owing to the character and thoughts of the people, no government except a limited monarchy could succeed. Thoughts are now changing on the subject. In America, no kind of monarchial government could succeed or even exist long in time of peace, though in time of war, in practice, the government is monarchial.

In England, the people demand that the government have dignity and power. In America, the people demand that the government be efficient and protect their liberty. The least power it can possess to protect liberty is considered best. In Europe, the people serve the government; in America, the government serves the people. In Europe, the government is the master or lord; in America, the people are the lords and master, the government their servant and agent. Jefferson's maxim was "that Government governeth best which governs least." European governments are governments of men; the United States is a government of laws and not of men.

Mr. Bagehot, in his book on England's Constitution, and in other writings, has given some interesting lessons on the English Government, as compared with that of the United States. He contends that English monarchy is a political and logical necessity, owing to the dispositions and traditions of the English people, and that such a government, for this same reason, is not only improbable in America, but impossible. He is an interesting writer, but he is not the superior of Mr. Bryce. He shows nothing like the familiarity of American governments, Constitutions and institutions, nor is he able to compare and contrast the two kinds, as clearly as does Mr. Bryce. He, however, does have some new ideas on the subject, or he has expressed the same thoughts in attractive words, phrases and sentences. This is especially true in his divisions of the two powers of government into those of "dignity" and "efficiency," and in showing how the one excels the other in the two kinds of powers. He says the dignified parts of the English government are complicated, old and venerable, while its efficient parts are simple and modern. He contends that the crowning virtue of the English government is not in the separation of its powers into the three departments, Legislative, Executive, and Judicial, but in the fusion of the first two into a Cabinet, which exercises the real sovereign power, no matter where or in whom it is in theory vested by the Constitution. His theory is that England is really and practically governed by the Cabinet, and not by

the Parliament, or the King, as is usually stated and believed. He shows that while the House of Commons creates the Cabinet, that the creature controls the Creator, and is created for the purpose of so controlling.

The Cabinet, in England, is not the mere agent of the Executive or Legislative departments, as the Cabinet, and Committees, are in the United States; but is really the government, and the other departments must do the Cabinet's bidding, or others will be elected or selected who will do their bidding. This Cabinet does not absorb either the Legislative or Executive power, but it fuses the two, or is the lever that controls both. Mr. Bagehot says of the English Cabinet :

The cabinet which was chosen by one House of Commons has an appeal to the next House of Commons. The chief committee of the Legislature has the power of dissolving the predominant part of that legislature—that which at a crisis is the Supreme Legislature. The English system, therefore, is not an absorption of the two. Either the cabinet legislates and acts, or else it can dissolve. It is a creature, but it has the power of destroying its creators. It is an executive which can annihilate the Legislature, as well as an executive which is the nominee of the Legislature. It is made, but it CAN unmake; it was derivative in its origin, but it is destructive in its action. *Bagehot's English Constitution, Vol. II, Federalist, Number I.*

The English Cabinet, which in fact is the government, forces legislation by compelling an election of other legislators, or of threats to resign. No such thing is possible in the United States. The whole of the Cabinet could resign without affecting any change in the law or creating much commotion in the House, Senate, or among the people. The resignations in the Cabinet of the United States are usually because of disagreement with the President who appoints and removes them, and fills vacancies. Sometimes a member resigns because of difference of views between him and other members of the Cabinet. An historical instance was when Jefferson resigned because of difference of views between him and Hamilton, as to matters of national affairs, though none between him and the President. Washington used his Cabinet to advise him, and not to do his bidding, while of course, he was not a man without opinions on those questions, he was one who sought advice, and appointed to his Cabinet the ablest statesmen in the land, and who were known to entertain different views on many questions. He wanted to hear the best that could be said on both sides of the question, and he heard it and was therefore well advised. It is to be regretted that

all the Presidents did not follow his example. The majority, however, have appointed their political friends and often partisans on the same side with the President.

They are also often appointed, not for advising the President, but for the doing of the will of the President and the party which elected him. They are expected to do the will of the President, and the President's will is usually of the party which elected him. In theory, however, the Cabinet is expected to advise the President, not to command, and the President is expected to advise the legislative department of the need of the government, but not to command.

During the administration of Mr. Johnson, who was serving out the remainder of the second term of Mr. Lincoln, who was assassinated soon after the beginning of his second term, there arose a serious feud and difference between Congress and Mr. Johnson, when neither would advise with the other, and if either advised the other, the advice was not heeded. The members of his Cabinet had been appointed or selected by Mr. Lincoln, and approved by the Senate, and they had to choose between Congress and the President. All of them went with the President except Mr. Stanton, Secretary of War, who sided with Congress, and declined to follow instructions of the President. The President called for his resignation, and he declined to resign. The President attempted to remove him, Congress having passed statutes to prevent the President from so removing Cabinet or other officers. The President's disregarding this statute was made one of the grounds of the impeachment proceedings against the President. The bone of contention between Congress and the President was the reconstruction of the Southern States which had seceded. Congress took the position that these States were not a part of the Union, and that they had to be thoroughly reconstructed before they could be re-admitted into the Union. The terms prescribed for their reconstruction were such that no one, except negroes, former slaves, carpet-baggers and scalawags could conscientiously take part in the reconstruction or government of the States. The plans prepared by Congress were intended to exclude all those who had taken part in or given aid and comfort to secession or of the Confederate Army from any participation in the New State governments to be created under the Acts of Congress. To this end, they put the people of these States under military order

rather than civil law, until the State governments should be established after the manner prescribed by these Reconstruction Acts.

These Acts not only attempted to make the negro the equal of his former master, but his superior, as to the right to participate in the State governments to be established. They also attempted to force social equality between the whites and negroes which was of course repugnant and contrary to the laws of nature, and contrary to the law of good morals. These laws were the most cruel ever written on American statute books, and were intended to humiliate and degrade the people of the Southern States, as much as to improve or elevate the condition of the negro. They were in the nature of reprisals as for the Acts of the people in the Southern States in connection with secession, slavery and war. The President was not willing to go to the length that Congress was, and he therefore vetoed all these Acts, but they were all easily passed over his veto. The fact that Johnson was a Southern man, no doubt, aggravated Congress and made it more against the Southern people, although, he was not a slave-holder, and did not believe in Slavery, opposed Secession, and took sides with the Northern Army. For this reason he was neither liked by the people of the South nor the North. His position was unfortunate, both on his own account, and that of the Southern, as well as the Northern, States.

Lincoln's death was the worst thing that could have happened to the Southern States. It was a much more serious blow to the South than to the North. Congress had followed his advice through the entire war. In fact, he was the idol of the majority of the people of the United States. Public opinion was with him, and Congress would not have opposed him as it did Johnson. The South would have been reconstructed according to his plans, and not that of Congress. Johnson was really only trying to carry out the plans of Lincoln. They were not his plans, he conceded they were Lincoln's, and all his Cabinet, with the one exception, conceded it and proclaimed it. The great leader was gone, however, and Congress was not willing to follow the advice of his successor, though it was the same as would have been that of Lincoln's. It thus appears that there is, in America, a division of powers and checks and balances, in practice as well as in theory. In times of peace, no one department can usurp the powers of or control the others; and that the Cabinet is power-



less to control either. In times of war, however, by common consent, the President directs, if he does not control, all the departments except the Judicial. Occasionally there is some opposition by some members of Congress, but it has never been effectual.

During the war of 1812, while Mr. Madison was President, there was considerable opposition. Some thought that the war should have been against France as well as England. Some were really in sympathy with England. They were also opposed to the Embargo declared by the President and Congress, similar to the one declared by Jefferson and Congress in 1807. This shut off all commerce, with almost all of Europe, and those engaged in commerce violently opposed the policy, and assailed the constitutionality of the Acts. They also opposed the invasion of Canada, and denied the power to send troops across the border. There were many threats of secession by some of the Eastern States. The Hartford Convention was called by those who opposed the course being pursued by the Administration. Its purpose was certainly to protest against the policy of the Administration. It was claimed by many that the purpose was to secede or withdraw from the Union; but the members of it denied any such purpose, and long after, published the proceedings which were held in secret to vindicate their claims that it was not revolutionary nor for the purpose of secession. Their acts, however, were deemed as being disloyal and unpatriotic by the friends of the administration and the masses of the people. Whatever was the motives, objects or purposes, it killed the Federal party, and it never could be revived thereafter. The war really ended while the meeting was in session, so it could have had no effect on the war. What might have been the result, had the war not ended, no one could know.

There was also strong opposition to the war between the States, both in the Northern and Southern States, but it soon subsided, the masses following the action of their respective States. There were some exceptions, but very few, except in the border States, such as Missouri, Kentucky, and Virginia, where the division was considerable. In the Northern States, those opposing the war were called Copper-heads, while those in the Southern States were called Moss-Backs, Bush-Whackers, and Scalawags. No matter what were their motives or their purposes, they were disgraced and ruined socially and politically. The public held them as traitors, though they

were not such in fact or in law. No nation or people will tolerate disloyalty or lack of patriotism in its citizens, though it amounts not to treason. When war is declared personal views or wishes count for nothing. The people must then stand together. There is then no time or place for politics or policies. All must do the bidding of the government. The government is then all, the people or the individual nothing.

During war American government is not unlike all European governments, however much it may differ during peace. There then must be unity of action, whatever difference of thought there may be. In practice, during war the United States is a monarchy, not a republic or a democracy. No war could be successfully carried on by a republican or democratic form of government, that is in practice. They may be democratic or republican in theory, but in practice, to be efficient in war, they must be monarchial, and almost despotic. Any war, continued very long, will destroy all the democracy or republicanism in any government. Democracies and republics are suited for peace; but not for war. It seems that it is as impossible to operate a government on democratic principles, during a war, as it is to operate an army on such principles. Wars may be waged for the purpose of destroying monarchial or despotic governments, and they may be successful, but the government or the people who wage the war must do so according to the principles of the monarchial or despotic government which they seek to destroy. Force can be overcome only by force. Concentrated forces can be overcome or wasted only by concentrated forces. Democracies, and republics, divide and distribute the forces of the people; monarchies, aristocracies and oligarchies collect and concentrate the forces. A concentration of all the powers of a great nation or people into the hands and will of one or a few men only can be successfully met and resisted and divided only by a like concentration and centralization of powers of another or other government, nation or people.

It is a law of nature which man cannot change, that force and power can be checked, controlled or destroyed only by like force and power, offered in an opposite direction. A military government or people can be checked or destroyed only by a more powerful military government. It is folly to talk of maintaining a democratic government during a war. For and during the great World War, Lloyd George is King, Czar, and dictator of England, and her Colonies; Clemenceau

is the same for France; President Wilson, the same for the United States. The other departments of the respective governments, and offices thereof high and low, are expected to do the will of him who is carrying on the war. To refuse to obey and to aid in conveying this will is at once to class those so refusing as enemies to the government, as slackers, if not traitors. The press, during war, molds public opinion even more than in time of peace, and it will not tolerate difference of opinion as to the best mode or method of conducting a war. The people may divide on the question as to whether or not war shall be declared, but after it is declared, there must be but one man, and all must do his bidding. This seems to be a natural law and to be higher than any written or unwritten Constitutional law.

### **The People May Protect Themselves Against Themselves.**

Judge Dillon has well described the American mode :

The absolutely unique feature of the political and legal institutions of the American republic is its written constitutions, which are organic limitations whereby the people by an act of unprecedented wisdom have, "in order to establish justice, to promote the general welfare and secure the blessings of liberty to themselves and their posterity," *protected themselves against themselves*. What renders this the more extraordinary is that these constitutions are self-imposed restraints. The spectacle is that of the acknowledged possessors of all political power voluntarily circumscribing and limiting the plenary and unrestrained use of it. History affords many examples where the holders of political power have been forced to surrender or to curtail it for the general good; but the example of the people constituting American political communities in limiting, by their own free will, the exercise of their own power, stood alone when this sublime sacrifice was made, and it has not been followed in any country in Europe, nor successfully put in operation elsewhere than in the United States. I said that in this way the people had protected themselves against themselves; and this they have done by making the Constitution in reality what, in its sixth article, it expressly declares itself to be, namely, "the supreme law of the land, binding the judges in every State, anything in the constitution or laws of any State to the contrary notwithstanding." *The Laws and Jurisprudence of England and America, 196-7.*

Political and speculative writers there are in Europe who still maintain that it is idle, unwise, or at any rate self-contradictory, for the sovereign or supreme power in a State to put limits upon itself; but more than a century ago the people of this country did restrain the exercise of their own power by organic limitations upon all the organs of the State. The wisdom and general efficiency of this political invention, for such it was, have been vindicated and established by

our long experience. The device—the idea—the political conception, if I may so term it—of written constitutions, belongs to the statesmen who founded our political institutions. *The Laws and Jurisprudence of England and America, 197, footnote.*

The devices which our constitutions provide to prevent precipitate action of the popular will are single and simple in principle, but elaborate, though not complex, in arrangement. They may thus be grouped and shortly stated: (a) Three co-ordinate departments, and the separation and distribution of all of the powers of the government into these departments,—each checking the other; (b) a system of representation with a double chamber,—each a check on the other; (c) the insertion of guarantees of primordial and fundamental rights,—Magna Charta enlarged and perfected,—into the Constitution; (d) distribution of powers between the States and the Federal Union; and (e) an independent judiciary, made the guardian of the Constitution with the crowning power and duty to declare unconstitutional statutes to be void,—all to the end that there may be secured "a government of laws and not of men." *The Laws and Jurisprudence of England and America, 198.*

There has always been and always will be strong disbelievers in popular republican governments, such as our own is. Judge Dillon thus speaks of them:

Disbelievers in republican institutions had predicted early shipwreck on these rocks, and when it came not, they simply postponed the period of fulfillment.

These prophecies have happily hitherto proved false,—so historically and signally false that as strong an unbeliever in popular government as Sir Henry Maine, speaking of the American Union and its unexampled career, was constrained, in 1885, to confess and declare that,—

*"All this beneficent prosperity reposes on the sacredness of contract and the stability of private property; the first the implement, and the last the reward, of success in the universal competition."*

For this frank and candid utterance of a truth which forced itself upon his convictions, I forgive all his doubts as to the success of popular government, and cancel the remembrance of his dismal forebodings. *The Laws and Jurisprudence of England and America, 210-11.*

Dr. David Jayne Hill thus defines Representative Government and distinguishes American from others:

We are sometimes told that the American government is only a projection, in a sense an extension, of the British government. It is not so. There were four principles, some of which were taken from the British system, which were combined to form our system.

1. Representative government, a heritage from the English liberty, dating perhaps from the Norman Conquest, but which English practice by electoral reforms in later years following American example was greatly to improve.



2. The division of powers; that is, a distribution of public powers established by law in such a manner as to prevent the absolute control of government by any one of its agencies.

3. The guarantee of personal immunities—the rights of free speech; freedom of the press; of peaceable assembly; of petition for redress of grievances; of bearing arms; of security of persons, houses, papers, and effects against unreasonable search; of trial by jury; of not being twice put in jeopardy of life and limb for the same offense; of refusing to bear witness against oneself; of not being deprived of life, liberty, or property without due process of law; and many other guarantees never before secured in any country by fundamental law.

Now these are not borrowed from England. England had no such fundamental law. England had the Great Charter, but the Great Charter permitted any right or liberty to be taken away from the Englishman by the judgment of his peers; but the Constitution of the United States lays it down as a rock-bottom principle that these liberties and others may not be taken away from the American citizen by the judgment of his peers. They are his. They are his forever, and they cannot be taken away.

4. Judicial protection of the constitutional guarantees—a unique provision never before provided for in any charter of human liberty—by which the government, and even a majority of the people or their representatives, cannot legally render valid the invasion of these immunities by any subsequent act of legislation.

By this combination of guarantees and provision for their protection, the Constitution of the United States gives to representative government a perfection that it had never before possessed, by placing upon the people's representatives a body of legal restraints that forbid their disregard of these primary rights and liberties, to secure which our independence as a nation was declared, and to maintain which the Constitution was adopted. *The Constitutional Review*, Vol. I, 7.

### What the American Commonwealth Has Taught Europe

The prophetic words of Alexander Hamilton have been obtained by the American Union, the United States. The world, including Europe, will acknowledge it when the present world war is ended.<sup>1</sup> In Number XI of the *Federalist*, Alexander Hamilton made this prophecy. He said:

The world may politically, as well as geographically, be divided into four parts, each having a distinct set of interests. Unhappily for the other three, Europe, by her arms and by her negotiations, by force and by fraud, has, in different degrees, extended her dominion over them all. Africa, Asia, and America, have successfully felt her domination. The superiority she has long maintained has tempted her to plume herself as the Mistress of the World, and to consider the rest of

<sup>1</sup>It was England then that "plumed herself the Mistress of the World;" to-day it is Germany. The Hamilton prophecy is now fulfilled. We have twice taught England that America must be reckoned with before she can rule the world, and we are now teach-

ing Germany the same lessons heretofore taught to England. While this note is being written the United States is not only "dictating the terms of connection between the old and new world," but also the terms of peace and connection of all the world.

mankind as created for her benefit. Men admired as profound philosophers have, in direct terms, attributed to her inhabitants a physical superiority, and have gravely asserted that all animals, and with them the human species, degenerate in America—that even dogs cease to bark after having breathed awhile in our atmosphere. Facts have too long supported these arrogant pretensions of the Europeans. It belongs to us to vindicate the honor of the human race, and to teach that assuming brother, moderation. Union will enable us to do it. Disunion will add another victim to his triumphs. Let Americans disdain to be the instruments of European greatness! Let the thirteen States, bound together in a strict and indissoluble Union, concur in erecting one great American system, superior to the control of all transatlantic force or influence, and able to dictate the terms of the connection between the old and new world!

### Dual Form of United States Government

Patterson in the Constitutional Convention said:

“Notwithstanding my solicitude to establish a national government, I never will agree to abolish the state governments, or render them absolutely insignificant. They are as necessary as the general government, and I shall be equally careful to preserve them. I am aware of the difficulty of drawing the line between the two, but hope it is not insurmountable. That the one government will be productive of disputes and jealousies against the other, I believe; but it will produce mutual safety. The convention cannot make a faultless government; but I will trust posterity to mend its defects.” *Bancroft on the History of the Constitution of the United States, 243.*

Sherman replied: “The more permanency a government has, the worse, if it be a bad one. I shall be content with six years for the senate; but four will be quite sufficient.”

“We are now to decide the fate of republican government,” said Hamilton; “if we do not give to that form due stability, it will be disgraced and lost among ourselves, disgraced and lost to mankind forever. I acknowledge I do not think favorably of republican government, but I address my remarks to those who do, in order to prevail on them to tone their government as high as possible. I profess myself as zealous an advocate for liberty as any man whatever; and trust I shall be as willing a martyr to it, though I differ as to the form in which it is most eligible. Real liberty is neither found in despotism nor in the extremes of democracy, but in moderate governments. Those who mean to form a solid republic ought to proceed to the confines of another government. If we incline too much from democracy, we shall soon shoot into a monarchy.” *Bancroft on the History of the Constitution of the United States, 246.*

The distribution of powers between the general government and the states was the most delicate and most difficult task before the convention. Startled by the vagueness of language in the Virginia resolve, Sherman on the seventeenth of July proposed the grant of powers “to make laws in all cases which may concern the common interests of the union, but not to interfere with the government of the

individual states in any matters of internal police which respect the government of such states only, and wherein the general welfare of the United States is not concerned." *Bancroft on the History of the Constitution of the United States*, 270.

### Dual Meaning of "Government of United States"

In dealing with foreign sovereignties, the term "United States" has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal government, wherever located. In its treaties and convention with foreign nations, this government is a unit.<sup>1</sup> This is so not because the territories comprised a part of the government established by the people of the States in their Constitution, but because the Federal government is the only authorized organ of the territories, as well as the States, in their foreign relations. By Art. I, sec. 10, of the Constitution, "no state shall enter into any treaty, alliance or confederation, . . . or enter into any agreement or compact with another state, or with a foreign power." It would be absurd to hold that the territories, which are much less independent than the States, and are under the direct control and tutelage of the general government, possess a power in this particular which is thus expressly forbidden to the States.

It may be added in this connection that, to put at rest all doubts regarding the applicability of the Constitution to the District of Columbia, Congress by the act of Feb. 21, 1871, specifically extended the Constitution and laws of the United States to this District. 182 U. S., 263.

### Advantages of Federal Government

The problem which all federalized nations have to solve is how to secure an efficient central government and preserve national unity, while allowing free scope for the diversities, and free play to the authorities, of the members of the federation. It is, to adopt that favorite astronomical metaphor which no American panegyrist of the Constitution omits, to keep the centrifugal and centripetal forces in equilibrium, so that neither the planet States shall fly off into space, nor the sun of the Central government draw them into its consuming flames. The characteristic merit of the American Constitution lies in the method by which it has solved this problem. It has given the National government a direct authority over all citizens, irrespective of the State governments, and has therefore been able safely to leave wide powers in the hands of those governments. And by placing the Constitution above both the National and State governments, it has referred the arbitrament of disputes between them to an independent

<sup>1</sup>If the States were not parties to the Constitution, how did the Constitution of the United States lawfully and peaceably acquire the powers, then possessed by the States, and not by the people? Because they had theretofore granted these powers to the States. How can rights or powers be reserved by a written grant or charter, except it be reserved to the grantors? Otherwise, it would be a grant or a convey-

ance and not a reservation to the States. Mr. Hamilton contended that the reservations were useless; but it was feared that unless the reservations were express, it might be contended that the powers passed. The reservations were intended to prevent this possibility of construing it as a grant by the States of any power not expressly mentioned as granted to the United States or denied to the States.

body, charged with the interpretation of the Constitution, a body which is to be deemed not so much a third authority in the government as the living voice of the Constitution, the unfolders of the mind of the people whose will stands expressed in that supreme instrument. *Bryce's American Commonwealth, Vol. I, 348.*

### Evils of Unlimited Power in Government

Mr. Adams thus wrote Jefferson on this subject:

The fundamental article of my political creed is, that despotism, or unlimited sovereignty, or absolute power, is the same in a majority of a popular assembly, an aristocratical council, an oligarchical junto, and a single emperor; equally arbitrary, cruel, bloody, and in every respect diabolical.

Accordingly, arbitrary power, wherever it has resided, has never failed to destroy all the records, memorials, and histories of former times which it did not like, and to corrupt and interpolate such as it was cunning enough to preserve or tolerate. We cannot therefore say with much confidence, what knowledge or what virtues may have prevailed in some former ages in some quarters of the world. *14 Jefferson's Writings, (Mem. ed.), pp. 359-360.*

### Spirit of Governments

Madison, the father of the Constitution, thus describes the principles:

No government is perhaps reducible to a sole principle of operation. Where the theory approaches nearest to this character, different and often heterogenous principles mingle their influence in the administration. It is useful, nevertheless, to analyze the several kinds of government, and to characterize them by the spirit which predominates in each.

Montesquieu has resolved the great operative principles of government into fear, honor, and virtue, applying the first to pure despotisms, the second to regular monarchies, and the third to republics. The portion of truth blended with the ingenuity of this system sufficiently justifies the admiration bestowed on its author. Its accuracy, however, can never be defended against the criticisms which it has encountered. Montesquieu was in politics not a Newton or a Locke, who established immortal systems—the one in matter, the other in mind. He was in his particular science what Bacon was in universal science. He lifted the veil from the venerable errors which enslaved opinion, and pointed the way to those luminous truths of which he had but a glimpse himself.

May not governments be properly divided, according to their predominant spirit and principles, into three species, of which the following are examples:

First. A government operating by a permanent military force, which at once maintains the government and is maintained by it; which is at once the cause of burden on the people, and of submission in the people to their burdens. Such have been the governments un-



der which human nature has groaned through every age. Such are the governments which still oppress it in almost every country of Europe, the quarter of the globe which calls itself the pattern of civilization and the pride of humanity.

Secondly. A government operating by corrupt influence, substituting the motive of private interest in place of public duty, converting its pecuniary dispensations into bounties to favorites or bribes to opponents, accommodating its measures to the avidity of a part of the nation instead of the benefit of the whole; in a word, enlisting an army of interested partisans, whose tongues, whose pens, whose intrigues, and whose active combinations, by supplying the terror of the sword, may support a real domination of the few, under an apparent liberty of the many. Such a government, wherever to be found, is an impostor. It is happy for the New World that it is not on the west side of the Atlantic. It will be both happy and honorable for the United States if they never descend to mimic the costly pageantry of its form, nor betray themselves into the venal spirit of its administration.

Thirdly. A government deriving its energy from the will of the society, and operating, by the reason of its measures, on the understanding and interest of the society. Such is the government for which philosophy has been searching and humanity been fighting from the most remote ages. Such are the republican governments which it is the glory of America to have invented, and her unrivaled happiness to possess. May her glory be completed by every improvement on the theory which experience may teach, and her happiness be perpetuated by a system of administration corresponding with the purity of the theory. *4 Writings of Madison, pp. 474-475.*

### **Form and Nature of the Government of the United States**

The government of the United States is a federal government. The United States is a republic, and so also is each of the states, the form of government being representative. *Black on Constitutional Law, 27.*

The father of the Constitution, in an essay on the subject, says:

Power being found by universal experience liable to abuses, a distribution of it into separate departments has become a first principle of free governments. By this contrivance, the portion entrusted to the same hands being less, there is less room to abuse what is granted; and the different hands being interested, each in maintaining its own, there is less opportunity to usurp what is not granted. Hence the merited praise of governments modeled on a partition of their powers into legislative, executive, and judiciary, and a separation of the legislative into different houses.

The political system of the United States claims still higher praise. The power delegated by the people is first divided between the General Government and the State governments, each of which is then subdivided into legislative, executive, and judiciary departments. And as in a single government these departments are to be kept separate and safe by a defensive armour for each, so, it is to be hoped,

do the two governments possess each the means of preventing or correcting unconstitutional encroachments of the other. Should this improvement in the theory of free government not be marred in the execution, it may prove the best legacy ever left by lawgivers to their country, and the best lesson ever given to the world by its benefactors. If a security against power lies in the division of it into parts mutually controlling each other, the security must increase with the increase of the parts into which the whole can be conveniently formed.

It must not be denied that the task of forming and maintaining a division of power between different governments is greater than among different departments of the same government, because it may be more easy (though sufficiently difficult) to separate by proper definitions the legislative, executive, and judiciary powers, which are more distinct in their nature, than to discriminate by precise enumerations, one class of legislative powers from another class, one class of executive from another class, one class of judiciary from another class, where, the power being of a more kindred nature, their boundaries are more obscure and run more into each other. *4 Writings of Madison, pp. 472-473.*

Mr. Davis says:

The Government is the machinery established by the Constitution; it is the agency created by the States when they formed the Union. Our fathers, having fought the war of the Revolution, and achieved their independence—each State for itself, each State standing out an integral part, each State separately recognized by the parent Government of Great Britain—these States as independent sovereignties entered into confederate alliance. After having tried the Confederation and found it to be a failure, they, of their own accord came peacefully together, and in a brief period made a Constitution, which was referred to each State and voluntarily ratified by each State that entered the Union; little time, little money and no blood being expended to form this Government, the machine for making the Union useful and beneficial. Blood, much and precious, was expended to vindicate and to establish community independence, and the great American idea that all governments rest on the consent of the governed, and that the people may at their will alter or abolish their government, however or by whomsoever instituted. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 65.*

The theory of our Constitution is one of peace, of equality of sovereign States. It was made by States and made for States; and for greater assurance they passed an amendment, doing that which was necessarily implied by the nature of the instrument, as it was a mere instrument of grants. But, in the abundance of caution, they declared that everything which had not been delegated was reserved to the States, or to the people—that is, to the State governments as instituted by the people of each State, or to the people in their sovereign capacity. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 67.*

Judge Dillon says:

Our government, state and national, embodies and rests upon the fundamental principle of the absolute and essential civil and political equality of all its citizens, whose collective will, expressed by majorities, is the rightful and only source of all political power. By this principle we must stand or fall. In adopting it, we reversed the doctrines of the governments of continental Europe, which doctrines were "all popular and constitutional rights, all useful and necessary changes in legislation and administration, can only emanate from the free will and concession of the monarch or instituted government." *The Laws and Jurisprudence of England and America, 144-5.*

"President Lincoln's celebrated phrase in his Gettysburg oration, wherein he described ours as the "government of the people, by the people, for the people," is not a mere flourish of rhetoric, but a definition historically of the people, because it was ordained by their sovereignty; *by* the people, because it is carried on by the representatives and servants; *for* the people, because it is maintained and conducted solely for their benefit and behoof. Well might the martyr President utter the fervent and effectual prayer that it might not "perish from the earth."

Judge Dillon, in a lecture before the Yale law school, said:

Our institutions failed of success! I deny it; a thousand times I deny it! In the name of every man who, like myself, has come through the terrible ordeal of poverty and knows what it is,—in the name of the unnumbered thousands of generous youth who must yet walk barefoot upon the heated ploughshares of this ordeal, I deny it; for the genius of our institutions will attend them, unseen, throughout the fiery trial, and give them a safe deliverance. What, let me ask, is the cause of our unexampled growth, our matchless prosperity? Not alone, or chiefly, a favored climate, and a fertile soil, but the magnetic force and marvelous power of our free institutions, whose chief glory is that all men are equal before the law, whose priceless benefaction is that all men have equal opportunities. A teacher of law who fails to inculcate a rational but hearty and sincere love of country fails in the discharge of a high and peremptory duty. *The Law and Jurisprudence of England and America, 150-1.*

Mr. Davis says:

The social problem of maintaining the just relation between constitution, government, and people, has been found so difficult, that human history is a record of unsuccessful efforts to establish it. A government, to afford the needful protection and exercise proper care for the welfare of a people, must have homogeneity in its constituents. It is this necessity which has divided the human race into separate nations, and finally has defeated the grandest efforts which conquerors have made to give unlimited extent to their domain. When our fathers dissolved their connection with Great Britain, by declaring themselves free and independent States, they constituted thirteen separate communities, and were careful to assert and preserve, each for itself, its sovereignty and jurisdiction. *Davis on The Rise and Fall of the Confederate Government, Vol. I, 1.*

Will any candid, well-informed man assert that, at any time between 1776 and 1790, a proposition to surrender the sovereignty of the States and merge them in a central government would have had the least possible chance of adoption? Can any historical fact be more demonstrable than that the States did, both in the Confederation and in the Union, retain their sovereignty and independence as distinct communities, voluntarily consenting to federation, but never becoming the fractional parts of a nation? That such opinions should find adherents in our day, may be attributable to the natural law of aggregation; surely not to a conscientious regard for the terms of the compact for union by the States. *Davis on the Rise and Fall of the Confederate Government, Vol. I, 2.*

Judge Dillon says:

The distinguishing excellence of the English Constitution and system of laws is that under it law is everywhere throughout English institutions and polity predominant and supreme. This, bear in mind, is not only the spirit but the very essence of the Constitution and legal institutions of England. Professor Dicey's excellent work, the "Law of the Constitution," was written mainly to bring out, illustrate and enforce this truth. Parliament is the legal sovereign, but its will can only be expressed in an act of Parliament, and this at once subjects such enactment, both as to its construction and enforcement, to the judicial courts. The crown can act only through ministers, who are *legally* responsible for the act, and thus the crown indirectly, and the minister directly, are brought under the supremacy of the law. You may recall Bacon's well-known remark in his Essays, that judges though they be "lions" yet should be "lions *under* the throne, being circumspect that they do not check or oppose any points of sovereignty." This was a covert plea for the prerogative, which Coke fought, which Parliament resisted, and which the Revolution of 1688 finally overthrew, establishing the independence of the judges and the rule and supremacy of the law administered by the judges. *The Laws and Jurisprudence of England and America, 224-5.*

"The Government of the United States," said Chief Justice Marshall, in *Marbury v. Madison*, 1 Cranch, 137, "has been emphatically termed a government of laws and not of men." "No man in this country," said Mr. Justice Miller, delivering the judgment of the court in *U. S. v. Lee*, 106 U. S. Rep., 196, 220, "is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

This great principle of personal liberty is strikingly illustrated in *Kilbourn v. Thompson*, 103 U. S. Rep., 168, which went so far as to establish that a person may recover damages for an unlawful imprisonment under an express order of the House of Representatives. *The Laws and Jurisprudence of England and America, 227, footnote.*

Mr. Venable thus speaks on the subject:

The Supreme Court of the United States, in *Texas v. White*, 7 Wall, 724-5, attempts to dispose of the question by what may be called a short method. It says: "By these (the Articles of Confederation)



the Union was solemnly declared 'be perpetual.' And when these articles were found to be inadequate to the exigencies of the country, the constitution was ordained 'to form a more perfect union.' It is difficult to convey the idea of indissoluble unity more clearly by these words. What can be indissoluble, if the perpetual union, made more perfect, is not?" *Richard M. Venable, in Reports of American Bar Association, Vol. 8, 247.*

While in the main the North maintained the national theory, it was clearly to its interest to do so. Most of the adherents of extreme states-rights view lived in the South, and their sentiments were dictated by their interests. In morals, if not constitutionally, the position of South Carolina was better than that of Pennsylvania on the tariff question. She wanted the national government to let her alone; while Pennsylvania wanted to use the Union for her own benefit. We can look with more tolerance on South Carolina when we bear in mind that the people who were lecturing her for her nullification tendencies were holding on with stolid selfishness to the fleshpot of protection. Much too has been said—and truthfully said—about the hectoring domination of the South in national politics down to the war; but the North should feel consoled by the reflection that during all this time she was getting out of the Union whatever of money value there was in it. Indications were not wanting, also, at the times of the Embargo Act, the War of 1812, and the Mexican War, that dissatisfaction with national measures could breed a states-right party even in New England. *Richard M. Venable, in Reports of American Bar Association, Vol. 8, 248.*

The literature of the era of the formation and adoption of the constitution is pervaded with certain theories of government; and, if time permitted, it would be an interesting inquiry to examine how far these theories influenced the partition of powers made by the constitution, and how far they have been sustained by its subsequent history.

These theories were, to name them briefly, the theories of local self-government, of checks and balances, and of an equilibrated adjustment of the states and national government. *Richard M. Venable, Reports of American Bar Association, Vol. 8, 251.*

If we were now to state the theory of local self-government, we would, probably, say that a modern nation is an organism, vital in all of its parts. There is a solidarity of national life; and the progress and efficiency of a country, and its rank as a nation, are to be determined by the progress and efficiency of all its parts. To deprive any part of the organism of its self-acting capacity and energies is to devitalize a portion of the organism; and the dead part lowers the efficiency of the whole.

We have already seen that the partition made by the constitution was determined by the antecedent of the country, and was not a deliberate work based on any theory. The theory of local self-government, held as a tradition from our English ancestors, was accepted in its fullness by the colonists. But the partition between state and national powers was not made on the line dictated by this theory. *Richard M. Venable, in Reports of American Bar Association, Vol. 8, 252.*

Mr. Calhoun thus describes the Government of the United States :

The two governments, General and State, stand to each other, in the first place, in the relation of parts to the whole; not, indeed, in reference to their organization or functions,—for in this respect both are perfect,—but in reference to their *powers*. As they divide between them the delegated powers appertaining to governments,—and as, of course, each is divested of what the other possesses, it necessarily requires the two united to constitute one entire government. That they are both paramount and supreme within the sphere of their respective powers,—that they stand, within these limits, as equals,—and sustain the relation of co-ordinate governments, has already been fully established. As co-ordinates, they sustain to each other the same relation which subsists between the different departments of the government—the executive, the legislative, and the judicial,—and for the same reason. These are co-ordinate; because each, in the sphere of its powers, is equal to, and independent of the others; and because the three united make the government. The only difference is that, in the illustration, each department, by itself, is not a government,—since it takes the whole in connection to form one; while the governments of the several States respectively, and that of the United States, although perfect governments in themselves, and in their respective spheres, require to be united in order to constitute one entire government. They, in this respect, stand as principal and supplemental;—while the co-departments of each stand in the relation of parts to the whole. *1 Calhoun's Works, pp. 197-8.*

To the rest of the world, the States composing this Union are now, and ever have been known in no other than their united, confederated character. Broad,—to the rest of the world,—they are but *one*. It is only at home, in their interior relations, that they are *many*; and it is to this twofold aspect that their motto, "*E pluribus unum*," appropriately and emphatically applies. So imperious was the necessity of union, and a common government to take charge of their foreign relations, that it may be safely affirmed, not only that it led to their formation, but that, without it, the States never would have been united. The same necessity still continues to be one of the strongest bonds of their union. But, strong as was, and still is, the inducement to union, in order to preserve their mutual peace and safety *within*, it was not, of itself, sufficiently strong to unite the parts composing this vast federal fabric; nor, probably, is it, of itself, sufficiently strong to hold them together. *1 Calhoun's Works, p. 201.*

Mr. Bryce thus speaks on this subject :

The administrative, legislative, and judicial functions for which the Federal Constitution provides are those relating to matters which must be deemed common to the whole nation, either because all the parts of the nation are alike interested in them, or because it is only by the nation that they can be satisfactorily undertaken. The chief of these common or national matters are—

War and peace: treaties and foreign relations generally.

Army and navy.

Federal courts of justice.

Commerce, foreign and domestic.

Currency.

Copyright and patents.

The post-office and post roads.

Taxation for the foregoing purposes, and for the general support of the Government.

The protection of citizens against unjust or discriminating legislation by any State.

This list includes the subjects upon which the national legislature has the right to legislate, the national executive to enforce the Federal laws, and general to act in defense of national interests, the national judiciary to adjudicate. All other legislation and administration is left to the several States, without power of interference by the Federal legislature or Federal executive. *Bryce's American Commonwealth, Vol. I, 30.*

It has been truly said that nearly every provision of the Federal Constitution that has worked well is one borrowed from or suggested by some State constitution: nearly every provision that has worked badly is one which the Convention, for want of a precedent, was obliged to devise for itself. To insist on this is not to detract from the glory of that illustrious body, for if we are to credit them with less inventiveness than has sometimes been claimed for them, we must also credit them with a double portion of the wisdom which prefers experience to *a priori* theory, and the sagacity which selects the best materials from a mass placed before it, aptly combining them to form a new structure. *Bryce's American Commonwealth, Vol. I, 32.*

The subjection of all the ordinary authorities and organs of government to a supreme instrument expressing the will of the sovereign people, and capable of being altered by them only, has been usually deemed the most remarkable novelty of the American system. But it is merely an application to the wider sphere of the nation, of a plan approved by the experience of the several States. And the plan had, in these States, been the outcome rather of a slow course of historical development than of conscious determination taken at any point of their progress from petty settlements to powerful commonwealth. *Bryce on the American Commonwealth, Vol. I, 34.*

Mr. Calhoun thus states the character and nature of our government:

Ours is a system of governments, compounded of the separate governments of the several States composing the Union, and of one common government of all its members, called the Government of the United States. The former preceded the latter, which was created by their agency. Each was framed by written constitutions; those of the several States by the people of each; acting separately, and in their sovereign character; and that of the United States, by the same acting in the same character,—but jointly instead of separately. All were formed on the same model. They all divide the powers of gov-

ernment into legislative, executive, and judicial; and are founded on the great principle of the responsibility of the rulers to the ruled. The entire powers of government are divided between the two; those of a more general character being specifically delegated to the United States; and all others not delegated, being reserved to the several States in their separate character. Each, within its appropriate sphere, possesses all the attributes, and performs all the functions of government. Neither is perfect without the other. The two combined, form one entire and perfect government. *1 Calhoun's Works, pp. 11, 112.*

It is democratic, in contradistinction to aristocracy and monarchy. It excludes classes, orders, and all artificial distinctions. To guard against their introduction, the constitution prohibits the granting of any title of nobility by the United States or by any State. The whole system is, indeed, democratic throughout. It has for its fundamental principle, the great cardinal maxim, that the people are the source of all power; that the governments of the several States and of the United States were created by them, and for them; that the powers conferred on them are not surrendered, but delegated; and, as such, are held in trust, and not absolutely; and can be rightfully exercised only in furtherance of the objects for which they were delegated.

It is federal as well as democratic. *Federal*, on the one hand, in contradistinction to *national*, and, on the other to a *confederacy*. *1 Calhoun's Works, pp. 112, 113.*

But as conclusive as these reasons are to prove that the government of the United States is federal, in contradistinction to national, it would seem, that they have not been sufficient to prevent the opposite opinion from being entertained. Indeed, this last seems to have become the prevailing one; if we may judge from the general use of the term "national," and the almost entire disuse of that of "federal." National is now commonly applied to "the general government of the Union,"—and "the federal government of these States,"—and all that appertains to them or to the Union. It seems to be forgotten that the term was repudiated by the convention, after full consideration; and that it was carefully excluded from the constitution, and the letter laying it before Congress. Even those who know all this,—and, of course, how falsely the term is applied,—have, for the most part, slid into its use without reflection. But there are not a few who so apply it, because they believe it to be a national government in fact; and among these are men of distinguished talents and standing, who have put forth all their powers of reason and eloquence, in support of the theory. *1 Calhoun's Works, pp. 118-119.*

It is no longer open to question that by the Constitution a nation was brought into being, and that that instrument was not merely operative to establish a closer union or league of states. Whatever powers of government were granted to the Nation or reserved to the states (and for the description and limitation of those powers we must always accept the constitution as alone and absolutely controlling), there was created a nation to be known as the United States of America, and as such then assumed its place among the nations of the world.



The first resolution passed by the convention that framed the Constitution, sitting as a committee of the whole, was: "Resolved, That it is the opinion of this committee that a national government ought to be established, consisting of a supreme legislative, judiciary, and executive." *1 Elliot's Debates, 151.*

In 4 Wheat, 316, 404, Judge Marshall said:

The government of the Union is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit. (See also 1 Wheat, 304.)

In 19 How. 393, Judge Taney observed:

The new government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one. But, when the present United States came into existence under the new government, it was a new political body, a new nation, then for the first time taking its place in the family of nations:

In Miller on the Constitution, 83, referring to the adoption of the Constitution, that learned jurist said: "It was then that a nation was born."

In the Constitution are provisions in separate articles for the three great departments of government—legislative, executive and judicial. But there is this significant difference in the grants of powers to these departments: The first article, treating of legislative powers, does not make a general grant of legislative power. It reads: "Art. 1, sec. 1. All legislative powers herein granted shall be vested in a congress," etc.; and in Art. 8, mentions and defines the legislative powers that are granted. By reason of the fact that there is no general grant of legislative power it has become an accepted constitutional rule that this is a government of enumerated powers. *206 U. S. 80-81.*

Mr. Jefferson's views of parties in government are as follows:

In every free and deliberating society, there must from the nature of man, be opposite parties, and violent dissensions and discords; and one of these, for the most part, must prevail over the other for a longer or shorter time. Perhaps this party division is necessary to induce each to watch and relate to the people the proceedings of the other. But if on a temporary superiority of the one party, the other is to resort to a scission of the Union, no federal government can ever exist. *10 Jefferson's Writings, (Mem. ed.), p. 45.*

Better keep together as we are, haul off from Europe as soon as we can, and from all attachments to any portions of it; and if they show their power just sufficiently to hoop us together, it will be the happiest situation in which we can exist. If the game runs some-

times against us at home, we must have patience till luck turns, and then we shall have an opportunity of winning back the *principles* we have lost. For this is a game where principles are the stake. 10 *Jefferson's Writings, (Mem. ed.), p. 47.*

Chancellor Kent thus defines the Government:

The Government of the United States was erected by the free voice and joint will of the people of America for their common defence and general welfare. Its powers apply to those great interests which relate to this country in its national capacity, and which depend for their stability and protection on the consolidation of the Union. It is clothed with the principal attributes of political sovereignty, and it is justly deemed the guardian of our best rights, the source of our highest civil and political duties, and the sure means of national greatness. 1 *Kent's Commentaries, 201; Miller's Const. pp. 115, 116.*

In 1820, Mr. Madison, in writing to General LaFayette, as to our government, and others, says:

We feel here all the pleasure you express at the progress of reformation on your Continent. DESPOTISM CAN ONLY EXIST IN DARKNESS, AND THERE ARE TOO MANY LIGHTS NOW IN THE POLITICAL FIRMAMENT TO PERMIT IT TO REIGN ANYWHERE AS IT HAS HERETOFORE DONE ALMOST EVERYWHERE. 3 *Writings of Madison, p. 189.*

Here, we are, on the whole, doing well, and giving an example of a free system, which, I trust, will be more of a pilot to a good port than a beacon-warning from a bad one. We have, it is true, occasional fevers, but they are of the transient kind, flying off through the surface, without preying on the vitals. A Government like ours has so many safety-valves, giving vent to overheated passions, that it carries within itself a relief against the infirmities from which the best of human institutions cannot be exempt. The subject which ruffles the surface of public affairs most, at present, is furnished by the transmission of the "Territory" of Missouri from a state of nonage to a maturity for self-government, and for a membership in the Union. Among the questions involved in it, the one most immediately interesting to humanity is the question whether a toleration or prohibition of slavery westward of the Mississippi would most extend its evils. 3 *Writings of Madison, p. 190.*

Judge Miller said our government is not a democracy.

It has been common to designate our form of government as a democracy, but in the true sense in which that term is properly used, as defining a government in which all its acts are performed by the people, it is about as far from it as any other of which we are aware. As has already been said, a pure democracy is almost unknown, from the difficulty of having all the people participate in the functions of government which include not only the processes of making the laws, but also the administration of them. Such was that of Athens, the

only highly civilized form of democracy that ever existed, where people from the streets, who could gather in the public places of the city, met and decided lawsuits, questions of the right of property, of the life or death of individuals, of the election, punishment, or censure of their officers, of the proprietorship of land, or of making war or preserving peace. *Miller's Const. pp. 84, 85.*

In the Athenian republic, the most democratic of the Greek states, when the population and suffrage were most extended, 317 B. C., but 21,000 were entitled to vote out of more than 500,000 \* \* \* Real democracy was first put in practice by the New England Colonies, and to this day the most perfect examples are the New England towns, where the whole adult male population assemble together and decide by their votes their own public affairs. *American Encyclopædia, tit. Democracy; Miller's Const. Note, p. 85.*

Mr. Madison says our Government is a compound one :

It has been too much the case in expounding the Constitution of the United States, that its meaning has been sought, not in its peculiar and unprecedented modifications of power, but by viewing it, some through the medium of a simple Government, others through that of a mere league of Governments. It is neither the one nor the other, but essentially different from both. It must, consequently, be its own interpreter. No other Government can furnish a key to its true character. Other Governments present an individual and indivisible sovereignty. The Constitution of the United States divides the sovereignty; the portions surrendered by the States composing the Federal sovereignty over specified subjects; the portions retained forming the sovereignty of each over the residuary subjects within its sphere. If sovereignty cannot be thus divided, the political system of the United States is a chimera, mocking the vain pretensions of human wisdom. If it can be so divided, the system ought to have a fair opportunity of fulfilling the wishes and expectations which cling to the experiment.

Nothing can be more clear than that the Constitution of the United States has created a Government, in as strict a sense of the term as the governments of the States created by their respective constitutions. The Federal Government has, like the State governments, its Legislative, its Executive, and its Judicial departments. It has, like them, acknowledged cases in which the powers of these departments are to operate; and the operation is to be directly on persons and things in the one Government as in the others. If in some cases the jurisdiction is concurrent as it is in others exclusive, this is one of the features constituting the peculiarity of the system.

In forming this compound scheme of Government, it was impossible to lose sight of the question, What was to be done in the event of controversies, which could not fail to occur, concerning the partition line between the powers belonging to the Federal and to the State governments? That some provision ought to be made, was as obvious and as essential as the task itself was difficult and delicate.

*4 Writings of Madison, pp. 61-62.*

The Supreme Court thus describes the character of our government:

For local interests, the several States of the Union exist, but for natural purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.

To preserve its independence, and to give security against foreign aggression, and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the same time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action it can make complaint to the executive head of our government, or resort to any measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy. *130 U. S., 606.*

Judge Bradley in 12 Wall. 457, 555, observes that "the United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the State governments. It has jurisdiction over all these general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulations and laws, such as the coinage, weights and measures, bankruptcies, the postal system, patent and copyright laws, the public lands and interstate commerce, all of which subjects are expressly or impliedly prohibited to the State governments. It had to suppress insurrections, as well as to repel invasions, and to organize, arm, discipline and call into service the militia of the whole country. The President is charged with the duty and invested with the power to take care that the laws be faithfully executed. The judiciary has jurisdiction to decide controversies between the States, and between their respective citizens, as well as



questions of national concerns; and the government is clothed with power to guarantee to every State a republican form of government, and to protect each of them against invasion and domestic violence." *130 U. S., 605.*

Mr. Madison thus speaks of the Vital Characteristics of the political system :

The two vital characteristics of the political system of the United States are, first, that the Government holds its powers by a charter granted to it by the people; second, that the powers of Government are formed into two grand divisions—one vested in a Government over the whole community, the other in a number of independent Governments over its component parts. Hitherto charters have been written grants of privileges by Governments to the people. Here they are written grants of power by the people to their Governments.

Hitherto, again, all the powers of Government have been, in effect, consolidated into one Government, tending to faction and a foreign yoke among a people within narrow limits, and to arbitrary rule among a people spread over an extensive region. Here the established system aspires to such a division and organization of power as will provide at once for its harmonious exercise on the true principles of liberty over the parts and over the whole, notwithstanding the great extent of the whole; the system forming an innovation and an epoch in the science of Government not less honorable to the people to whom it owed its birth, than auspicious to the political welfare of all others who may imitate or adopt it.

As the most arduous and delicate task in this great work lay in the untried demarkation of the line which divides the general and the particular Governments by an enumeration and definition of the powers of the former, more especially the legislative powers; and as the success of this new scheme of policy essentially depends on the faithful observance of this partition of powers, the friends of the scheme, or rather the friends of liberty and of man, cannot be too often earnestly exhorted to be watchful in marking and controlling encroachments by either of the Governments on the domain of the other. *4 Writings of Madison, pp. 138-99.*

Mr Madison undoubtedly had the clearest insight into the nature and structure of our government, because its mechanism was more the work of his mind and hand than that of any other man.

He has thus stated the rules :

As there are legal rules for interpreting laws, there must be analogous rules for interpreting constitutions: and among the obvious and just guides applicable to the Constitution of the United States may be mentioned—

1. The evils and defects for curing which the Constitution was called for and introduced.
2. The comments prevailing at the time it was adopted.

3. The early, deliberate, and continued practice under the Constitution, as preferable to constructions adapted on the spur of occasions, and subject to the vicissitudes of party or personal ascendencies.

On recurring to the original of the Constitution and examining the structure of the Government, we perceive that it is neither a Federal Government, created by the State Governments, like the revolutionary Congress, nor a consolidated Government (as that term is now applied,) created by the people of the United States as one community, and, as such, acting by a numerical majority of the whole.

The facts of the case which must decide its true character, a character without a prototype, are, that the Constitution was created by the people as composing distinct States, and acting by a majority in each; that, being derived from the same source as the constitutions of the States, it has within each State the same authority as the constitution of the State, and is as much a constitution, in the strict sense of the term, as the constitution of the State; that, being a compact among the States in their highest sovereign capacity, and consulting the people thereof one people for certain purposes, it is not revocable or alterable at the will of the States individually, as the constitution of a State is revocable and alterable at its individual will:

That the sovereign or supreme powers of government are divided into the separate depositories of the Government of the United States and the governments of the individual States:

That the Government of the United States is a government, in as strict a sense of the term, as the governments of the States; being, like them, organized into Legislative, Executive, and Judiciary departments, operating like them, directly on persons and things, and having, like them, the command of a physical force for executing the powers committed to it:

That the supreme powers of government being divided between different governments, and controversies as to the landmarks of jurisdiction being unavoidable, provision for a peaceable and authoritative decision of them was obviously essential:

That, to leave this decision to the States, numerous as they were, and with a prospective increase, would evidently result in conflicting decisions subversive of the common Government and of the Union itself.

That, according to the actual provision against such calamities, the Constitution and laws of the United States are declared to be paramount to those of the individual States, and an appellate supremacy is vested in the judicial power of the United States:

That, as safeguards against usurpations and abuses of power by the Government of the United States, the members of its Legislative and the head of its Executive department are eligible by, and responsible to, the people of the States or the Legislatures of the States; and as well the Judicial as the Executive functionaries including the head, are impeachable by the Representatives of the people in one branch of the Legislature of the United States, and triable by the Representatives of the States in the other branch:

States can, through forms of the constitutional elective provisions, control the General Government. This has no agency in electing State governments, and can only control them through the functionaries, particularly the Judiciary, of the General Government:

That in case of an experienced inadequacy of these provisions, an ulterior resort is provided in amendments attainable by an intervention of the States, which may better adapt the Constitution for the purposes of its creation.

Should all these provisions fail, and a degree of oppression ensue, rendering resistance and revolution a lesser evil than a longer passive obedience, there can remain but the *ultima ratio*, applicable to extreme cases, whether between nations or the component parts of them. 4 *Writings of Madison*, pp. 74, 75, 76.

### Attempt to Change Form of Government.

Mr. Jefferson, while Secretary of State, during Gen. Washington's first term, thought he discovered a plot on the part of some men to change the form of government to that of a Monarchy, and to block this attempt he insisted on General Washington offering for President a second time which was contrary to the views of both Washington and Jefferson. Of this plot, he wrote the President as follows:

The ultimate object of all this is to prepare the way for a change from the present republican form of government to that of a monarchy, of which the English Constitution is to be the model: that this was contemplated by the convention is no secret, because its partisans have made more of it. To effect it then was impracticable, but they are still eager after their object, and are predisposing everything for its ultimate attainment. So many of them have got into the Legislature, that, aided by the corrupt squadron of paper dealers, who are at their devotion, they make a majority in both houses. The republican party, who wish to preserve the government in its present form, are fewer in number; they are fewer even when joined by the two, three, or half dozen anti-federalists, who, though they dare not avow it, are still opposed to any General Government; but, being less so to a republican than a monarchical one, they naturally join those whom they think pursuing the lesser evil.

Of all the mischiefs objected to the system of measures before mentioned, none is so afflicting and fatal to every honest hope, as the corruption of the Legislature.

And this is the event at which I tremble, and to prevent which I consider your continuing at the head of affairs as of the last importance. The confidence of the whole Union is centered in you. Your being at the helm will be more than an answer to every argument which can be used to alarm and lead the people in any quarter, into violence and secession. North and South will hang together if they have you to hang on; and if the first correction of a numerous representation should fail in its effect, your presence will give time for trying others, not inconsistent with the union and peace of the States. 8 *Jefferson's Writings*, (mem. ed.), p. 347.

A few weeks later he wrote Gen. LaFayette as follows:

Behold you, then, my dear friend, at the head of a great army establishing the liberties of your country against a foreign enemy. May heaven favor your cause, and make you the channel through which it may pour its favors. While you are estimating the monster Aristocracy, and pulling out the teeth and fangs of its associate, Monarchy, a contrary tendency is discovered in some here. A sect has shown itself among us, who declare they espoused our new Constitution not as a good and sufficient thing in itself, but only as a step to an English constitution, the only thing good and sufficient in itself, in their eye. It is happy for us that these are preachers without followers, and that our people are firm and constant in their republican purity. You will wonder to be told that it is from the eastward chiefly that these champions for a king, lords, and commons, come. They get some important associates from New York, and are puffed up by a tribe of Agioteurs which have been hatched in a bed of corruption made up after the model of their beloved England. Too many of these stock-jobbers and king-jobbers have come into our Legislature, or rather too many of our Legislature have become stock-jobbers and king-jobbers. However, the voice of the people is beginning to make itself heard, and will probably cleanse their seats at the ensuing election. 8 *Jefferson's Writings, (mem. ed.), pp. 380-381*

That President Washington believed such a plot existed, is shown by the following letter to him by Jefferson, wherein the latter says:

I now take the liberty of proceeding to that part of your letter wherein you notice the internal dissensions which have taken place within our government, and their disagreeable effect on its movements. That such dissensions have taken place is certain, and even among those who are nearest to you in the administration. To no one have they given deeper concern than myself; to no one equal mortification at being myself a part of them. 8 *Jefferson's Writings, (mem. ed.), p. 395.*

Mr. Jefferson undoubtedly believed that Hamilton desired to establish a monarchy, and not a republic. The following excerpt from his letters to the President proves that this was his estimation of Hamilton:

If the question be by whose fault is it that Colonel Hamilton and myself have not drawn together? the answer will depend on that to two other questions, whose principles of administration best justify, by their purity, conscientious adherence? and which of us has, notwithstanding, stepped farthest into the control of the department of the other?

To this justification of opinions, expressed in the way of conversation, against the views of Colonel Hamilton, I beg leave to add some notice of his late charges against me in Fenno's Gazette; for neither the style, matter, nor venom of the pieces alluded to, can leave a doubt of their author. Spelling my name and character at full length to



the public, while he conceals his own under the signature of "An American," he charges me, 1st. With having written letters from Europe to my friends to oppose the present Constitution, while depending. 2d. With a desire of not paying the public debt. 3d. With setting up a paper to descry and slander the government. 1st. The first charge is most false. No man in the United States, I suppose, approved of every title in the Constitution: no one, I believe, approved more of it than I did, and more of it was certainly disapproved by my accuser than by me, and of its parts most vitally republican. 8 *Jefferson's Writings, (mem. ed.), pp. 399-400.*

You will there see that my objection to the Constitution was, that it wanted a bill of rights securing freedom of religion, freedom of the press, freedom from standing armies, trial by jury, and a constant habeas corpus act. Colonel Hamilton's was, that it wanted a king and house of lords. The sense of America has approved my objection and added the bill of rights, not the king and lords. I also thought a longer term of service, insusceptible of renewal, would have made a President more independent. My country has thought otherwise, I have acquiesced implicitly. He wishes the General Government should have power to make laws binding the States in all cases whatsoever. Our country has thought otherwise: has he acquiesced? Notwithstanding my wish for a bill of rights, my letters strongly urged the adoption of the Constitution, by nine States at least, to secure the good it contained. I at first thought that the best method of securing the bill of rights would be four States to hold off till such a bill should be agreed to. But the moment I saw Mr. Hancock's proposition to pass the Constitution as it stood, and give perpetual instructions to the representatives of every State to insist on a bill of rights, I acknowledged the superiority of his plan, and advocated universal adoption. 8 *Jefferson's Writings, (Mem. ed.), pp. 400-401.*

### Compacts in the United States Government

Mr. Madison's ideas as to the Constitution's being a compact follows:

If the Supreme Court of the United States be found or deemed not sufficiently independent and impartial for the trust committed to it, a better tribunal is a desideratum. But, whatever this may be, it must necessarily derive its authority from the whole, not from the parts; from the States in some collective, not individual capacity. And as some such tribunal is a vital element, a *sine qua non*. in an efficient and permanent Government, the tribunal existing must be acquiesced in until a better or more satisfactory one can be substituted. \* \* \*

Although the old idea of a compact between the Government and the people be justly exploded, the idea of a compact among those who are parties to a Government is a fundamental principle of free Government. \* \* \*

The original compact is the one implied or presumed, but nowhere reduced to writing, by which a people agree to form one society. The next is a compact, here for the first time reduced to writing, by which

the people in their social state agree to a Government over them. These two compacts may be considered as blended in the Constitution of the United States, which recognizes a union or society of States, and makes it the basis of the Government formed by the parties to it. *4 Writings of Madison, p. 63.*

Applying a like view of the subject to the case of the United States, it results, that the compact being among individuals as embodied into States, no State can at pleasure release itself therefrom and set up for itself. The compact can only be dissolved by the consent of the other parties, or by usurpations or abuses of power justly having that effect. It will hardly be contended that there is anything in the terms or nature of the compact authorizing a party to dissolve it at pleasure. *4 Writings of Madison, p. 64.*

Even in the case of a mere league between nations absolutely independent of each other, neither party has a right to dissolve it at pleasure, each having an equal right to expound its obligations, and neither, consequently, a greater right to pronounce the compact void than the other has to insist on the mutual execution of it (See, in Mr. Jefferson's volumes, his letters to J. M., Mr. Monroe, and Col. Carlington.) *4 Writings of Madison, p. 65.*

The Government of the United States, like all governments free in their principles, rests on compact; a compact, not between the government and the parties who formed and live under it, but among the parties themselves; and the strongest of governments are those in which the compacts were most fairly formed and the compact faithfully executed.

Now all must agree that the compact in the case of the United States was duly formed, and by a competent authority. It was formed in fact, by the people of the several States in their highest sovereign authority; an authority which could have made the compact a mere league, or a consolidation of all entirely into one community. Such was their authority if such had been their will. It was their will to prefer to either the constitutional Government now existing; and this being undeniably established by a competent and even the highest human authority, it follows that the obligation to give it all the effect to which any government could be entitled, whatever the mode of its formation, is equally undeniable. *4 Writings of Madison, pp. 422-423.*

### **Government of United States Not a Compact or League**

The system of government existing under the articles of confederation was not a federal government, but a confederacy, in the sense of these terms as already explained. The articles constituted a league or treaty between the several States. They purport to have been adopted by delegates from the individual States, and to establish a 'firm league of friendship' between these States. It is not a league, treaty, convention, or compact between these States. It does not depend, either for its existence or its continuance, upon the consent of the States. The organic act, the constitution, was framed by the delegates representing the several States in convention. But it was

submitted to the consideration and acceptance of the people. The States did not act upon it. It was ratified and adopted by the people of the United States, who, acting for purposes of convenience within their representative States, appointed delegates for the sole purpose of deciding upon its adoption. *Black's on Constitutional Laws, 30.*

### Governments in Confederacies

Montesquieu's theories as to this form of government are thus stated:

If the republic be small, it is destroyed by a foreign force; if it be large, it is ruined by an internal imperfection.

To this twofold inconveniency democracies and aristocracies are equally liable, whether they be good or bad. The evil is in the very thing itself, and no form can redress it.

It is therefore very probable that mankind would have been, at length, obliged to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchial government. I mean, a confederate republic.

This form of government is a convention, by which several petty states agree to become members of a larger one, which they intend to establish. It is a kind of assemblage of societies, that constitute a new one, capable of increasing by means of farther associations, till they arrive to such a degree of power, as to be able to provide for the security of the whole body.

It was these associations that so long contributed to the prosperity of Greece. By these the Romans attacked the whole globe; and by these alone the whole globe withstood them. For, when Rome was arrived to her highest pitch of grandeur, it was the associations beyond the Danube and the Rhine, associations formed by the terror of her arms, that enabled the barbarians to resist her. *Montesquieu's Works, Book IX, Chapter I.*

The spirit of monarchy is war and enlargement of dominion; peace and moderation is the spirit of a republic. These two kinds of government cannot naturally subsist in a confederate republic. Thus we observe, in Roman history, that, when the Veientes had chosen a king, they were immediately abandoned by all the other petty republics of Tuscany. Greece was undone as soon as the kings of Macedonia obtained a seat among the Amphictyons.

The confederate republic of Germany, composed of princes and free towns, subsists by means of a chief, who is, in some respects, the magistrate of the union, in others, the monarch. *Montesquieu's Works, Book IX, Chapter II.*

<sup>1</sup>Mr. Black holds with Story and Marshall that the Constitution was adopted by the people of the United States, and not by the States as Calhoun, Davis and others contend. The truth is, both contentions are correct in part and erroneous in part. Mr. Madison shows in the immediately preceding quotations the needed qualifications to every theory. The people of the thirteen States as one body, did not

call the Constitutional Convention, did not draft or ratify or reject it, nor have they as one body ever proposed, or adopted amendments thereto. The States were necessary parties to the Constitution. The powers granted to the United States were then vested in the several States by grants of the people of the several States. No title could have passed unless the States were parties thereto.

## Tendencies of Consolidated and Federal Governments

Mr. Calhoun thus states the tendencies :

If the federal government be left to decide, definitely and in the last resort, as to the extent of its powers, having no sufficient consideration, exterior to itself, it must necessarily move in the direction marked out by the inherent tendency belonging to its character and position. As a constitutional, popular government, its tendency will be, in the first place, to an absolute form, under the control of the numerical majority; and, finally, to the most simple of these forms, that of a single, irresponsible individual. As a federal government, extending over a vast territory, the tendency will be, in the first place, to the formation of sectional parties, and the concentration of all power in the stronger section; and, in the next, to conflict between the sections, and disrapture of the whole system. One or the other must be the end, in the case supposed. The laws that would govern are fixed and certain. The only question would be, as to *which end*, and at *what time*. All the rest is as certain as the future, if not disturbed by causes exterior to the system. *1 Calhoun's Works, p. 308.*

## Written and Unwritten Constitutions

Hon. William R. Riddell, Justice of the Supreme Court of Canada, thus points out the distinction between the English and American constitutions :

The word "constitution" carries with it a different connotation in English and in American usage, and we in Canada follow the English. In our usage, the Constitution is the totality of the principles more or less vaguely and generally stated upon which we think the people should be governed; in American usage, the Constitution is a written document containing many words and letters, which authoritatively and without appeal dictates what shall and what shall not be done. With us anything unconstitutional is wrong, no matter how legal it may be. With the American, anything which is unconstitutional is illegal, no matter how right it may be. With the American, anything which is unconstitutional rather suggests that it is legal but inadvisable.<sup>1</sup> *Riddell, in the Constitutional Review, Vol. II, No. 2, p. 71.*

## Difference Between a Federal Government and a Confederacy

Mr. Calhoun thus states the difference :

It, a Federal government, differs and agrees, but in opposite respects, with a national government, and a confederacy. It differs from the former, inasmuch as it has, for its basis, a confederacy, and not a nation; and agrees with it in being a government: while it agrees with the latter, to the extent of having a confederacy for its basis, and differs from it, inasmuch as the powers delegated to it are carried into execution by a government,—and not by a mere congress of delegates, as is the case in a confederacy. To be more full and

<sup>1</sup>The above the compiler believes to be the best and truest statement of a chief difference between English and

American Constitutions which is to be found in all the books.



explicit,—a federal government, though based on a confederacy, is, to the extent of the powers delegated, as much a government as a national government itself. It possesses, to this extent, all the authorities possessed by the latter, and as fully and perfectly. The case is different with a confederacy; for, although it is sometimes called a *government*,—its Congress, or Council, or the body representing it, by whatever name it may be called, is much more nearly allied to an assembly of diplomatists convened to deliberate and determine how a league or treaty between their several sovereigns, for certain defined purposes, shall be carried into execution; leaving to the parties themselves, to furnish their quota of means, and to co-operate in carrying out what may have been determined on. Such was the character of the Congress of our confederacy; and such, substantially, was that of similar bodies in all confederated communities, which preceded our present government. Our system is the first that ever substituted a *government* in lieu of such bodies. This, in fact, constitutes its peculiar characteristic. It is new, peculiar, and unprecedented. 1 *Calhoun's Works*, pp. 162-3.

### Monarchies and Republics Compared

Mr. Madison is the author of the following observations:

In Monarchies there is a twofold danger: 1st. That the eyes of a good prince cannot see all that he ought to know. 2nd. That the hands of a bad one will not be tied by the fear of combinations against him. Both these evils increase with the extent of domain; and prove, contrary to the received opinion, that monarchy is even more unfit for a great State than for a small one, notwithstanding the greater tendency in the former to that species of government. Aristocracies, on the other hand, are generally seen in small States; where a concentration of the public will is required by external danger, and that degree of concentration is found sufficient. The *many*, in such cases, cannot govern on account of emergencies which require the promptitude and precautions of a few, whilst the *few* themselves resist the usurpations of a *single* tyrant. In Thessaly, a country intersected by mountainous barriers into a number of small cantons, the governments, according to Thucydides, were in most instances oligarchical. Switzerland furnishes similar examples. The smaller the State the less intolerable is this form of government, its rigors being tempered by the facility and the fear of combinations among the people.

A Republic involves the idea of popular rights. A representative Republic *chooses* the wisdom of which hereditary aristocracy has the *chance*; whilst it excludes the oppression of that form. And a confederated Republic attains the force of monarchy, whilst it equally avoids the ignorance of a good prince and the oppression of a bad one. To secure all the advantages of such a system, every good citizen will be at once a sentinel over the rights of the people, over the authorities of the confederal government, and over both the rights and the authorities of the intermediate governments. 4 *Writings of Madison*, p. 467.

## Monarchies and Their Governments

In monarchies, the prince is the source of all power, political and civil. These fundamental laws necessarily suppose the intermediate channels through which the power flows; for, if there be only the momentary and capricious will of a single person to govern the state, nothing can be fixed, and of course there is no fundamental law.

The most natural intermediate and subordinate power is that of the nobility. This, in some measure, seems to be essential to a monarchy, whose fundamental maxim is, *No monarch, no nobility, no nobility, no monarch*: but there may be a despotic prince.

There are men who have endeavored, in some countries in Europe, to suppress the jurisdiction of the nobility; not perceiving that they were driving at the very thing that was done by the parliament of England. Abolish the privileges of the lords, the clergy, and cities, in a monarchy, and you will soon have a popular state, or else a despotic government. *Montesquieu's Works, Book II, Chapter IV.*

In monarchies, policy effects great things with so little virtue as possible. Thus, in the nicest machines, art has reduced the number of movements, springs, and wheels.

The state subsists independently of the love of our country, of the thrift of true glory, of self-denial, of the sacrifice of our dearest interests, and of all those heroic virtues which we admire in the ancients, and to us are known only by story. *Montesquieu's Works, Book III, Chapter V.*

Ambition in idleness, meanness mixed with pride, a desire of riches without industry, aversion to truth, flattery, perfidy, violation of engagements, contempt of civil duties, fear of prince's virtue, hope for his weakness, but, above all, a perpetual ridicule cast upon virtue, are, I think, the characteristics by which most courtiers, in all ages and countries, have been constantly distinguished. *Montesquieu's Works, Book III, Chapter VI.*

If monarchy wants one spring, it is provided with another. Honour, that is, the prejudice of every person and rank, supplieth the place of the political virtue of which I have been speaking, and is everywhere her representative: here it is capable of inspiring the most glorious actions, and, joined with the force of laws, may lead us to the end of government as well as virtue itself.

Hence, in well-regulated monarchies, they are almost all good subjects, and very good men; for, to be a good man, a good intention is necessary, and we should love our country not so much on our own account as out of regard to the community. *Montesquieu's Works, Book III, Chapter VI.*

Ambition is pernicious in a republic; but in a monarchy it has some good effects; it gives life to the government, and is attended with this advantage, that it is no way dangerous, because it may be continually checked.

It is with this kind of government as with the system of the universe, in which "*there is a power that constantly repels all bodies*

from the center, and a power of gravitation, but attracts them to it.”<sup>1</sup> Honour sets all the parts of the body politic in motion, and, by its very action, connects them; thus each individual advances the public good, while he only thinks of promoting his own interest.

True it is, that, philosophically speaking, it is false honor which moves all the parts of the government; but even this false honor is as useful to the public as true honor could possibly be to private people. \* *See*

Is it not a very great point, to oblige men to perform the most difficult actions, such as requires an extraordinary exertion of fortitude and resolution, without any other recompence than that of glory and applause. *Montesquieu's Works, Book III, Chapter IX.*

Aristotle is greatly puzzled in treating of monarchy. He makes five species; and he does not distinguish them by the form of constitution, but by things merely accidental, as the virtues and vices of the prince; or by things extrinsical, such as tyranny usurped or inherited.

Among the number of monarchies, he ranks the Persian empire and the kingdom of Sparta. But is it not evident that the one was a despotic state, and the other a republic?

The ancients, who were strangers to the distributions of the three powers in the government of a single person, could never form a just idea of monarchy. *Montesquieu's Works, Book XI, Chapter IX.*

An elective monarchy, like that of Rome, necessarily supposeth a powerful aristocratic body to support it; without which it changes immediately into tyranny or into popular state. But a popular state has no need of this distinction of families to maintain itself. To this it was owing that the patricians, who were a necessary part of the constitution under the regal government, became a superfluous branch under the consuls; the people could suppress them without hurting themselves, and change the constitution without corrupting it. *Montesquieu's Works, Book XI, Chapter XIII.*

There are four things that greatly prejudiced the liberty of Rome. The patricians had engrossed to themselves all public employments whatever; an exorbitant power was annexed to the consulate; the people were often insulted; and, in fine, they had scarce any influence at all left in the public suffrages. These four abuses were redressed by the people.

1st. It was regulated, that the plebeians might aspire to some magistrates; and by degrees they were rendered capable of them all, except that of *interrex*. *Montesquieu's Works, Book XI, Chapter XIV.*

Rome, whose passion was to command, whose ambition was to conquer, whose commencement and progress were one continued usurpation, had constantly affairs of the greatest weight upon her hands; her enemies were ever conspiring against her, or against her policies.

<sup>1</sup>The above, so far as the writer knows, is the first reference to the fact that the laws of government should conform to the laws of nature, a principle which was applied in the construction of the American Federal government, and which Mr. Webster on many occasions so beautifully and so elegantly described; warning us of the

danger of increasing the centrifugal force to such an extent as to cause the State to fly off into space, and collide with each other, or other governments, as well as the danger of increasing the centripetal force so as to cause the States to fly in at the radii and be overpowered by the great central government.

As she was obliged to behave on the one hand with heroic courage, it was requisite, of course, that the management of affairs should be committed to the senate. Thus the people disputed every branch of the legislative power with the senate, because they were jealous of their liberty; but they had not disputes about the executive, because they were animated with the love of glory. *Montesquieu's Works, Book XI, Chapter XVII.*

Great is the advantage which a monarchical government has over a republic. As the state is conducted by a single person, the executive power is thereby enabled to act with greater expedition; but, as this expedition may degenerate into rapidity, the laws should use some contrivance to slacken it; they ought not only to favour the nature of each constitution, but likewise to remedy the abuses that might result from this very nature. *Montesquieu's Works, Book V, Chapter X.*

Monarchy has a great advantage over a despotic government. As it naturally requires there should be several orders or ranks of subjects, the state is more permanent, the constitution more steady, and the person of him who governs more secure.

Cicero is of the opinion, that the establishing of the tribunes preserved the republic. "And, indeed, (says he) the violence of a headless people is more terrible. A chief, or head, is sensible that the affair depends upon himself, and therefore he thinks; but the people, in their impetuosity, are ignorant of the danger into which they hurry themselves." This reflection may be applied to a despotic government, which is a people without tribunes, and to a monarchy, where the people have some sort of tribunes. *Montesquieu's Works, Book V, Chapter XI.*

The prince cannot impart a greatness which he has not himself; with him there is no such thing as glory.

It is in monarchies we behold the subjects encircling the throne, and cheered by the irradiancy of the sovereign; there it is that such person, filling, as it were, a larger space, is capable of exercising those virtues which adorn the soul, not with the independence, but with true dignity and greatness. *Montesquieu's Works, Book V, Chapter XII.*

### Despotic Governments

As virtue is necessary in a republic, and, in a monarchy, honour, so fear is necessary in a despotic government: with regard to virtue, there is no occasion for it, and honour would be extremely dangerous.

Here, the immense power of the prince is devolved entirely upon those whom he is pleased to intrust with the administration. Persons, capable of setting a value upon themselves, would be likely to create disturbances. Fear must, therefore, depress their spirits, and extinguish even the least sense of ambition.

A moderate government may, whenever it pleases, and without the least danger, relax its springs: it supports itself by the laws and by its own internal strength. But, when a despotic prince creates one single moment to lift up his arm, when he cannot constantly demolish



those whom he has intrusted with the first employments, all is over; for, as fear, the spring of this government, no longer subsists, the people are left without a protector. *Montesquieu's Works, Book III, Chapter IX.*

One thing, however, may be sometimes opposed to the prince's will, namely religion. They will abandon, nay, they will slay a parent, if the prince so commands, but he cannot oblige them to drink wine. The laws of religion are of superior nature, because they bind the sovereign as well as the subject. But, with respect to the law of nature, it is otherwise; the prince is no longer supposed to be a man. *Montesquieu's Works, Book III, Chapter X.*

In despotic states, the nature of government requires the most passive obedience; and, when once the prince's will is made known, it ought infallibly to produce its effect. *Montesquieu's Works, Book III, Chapter X.*

As education in monarchies tends to raise and ennoble the mind, in despotic governments its only aim is to debase it. Here it must necessarily be servile: even in power such an education will be an advantage, because every tyrant is at the same time a slave.

Excessive obedience supposes ignorance in the person that obeys. *Montesquieu's Works, Book IV, Chapter III.*

Here therefore education is in some measure needless, to give something, one must take away everything; and begin with making a bad subject, in order to make a good slave.

For why should education take pains in forming a good citizen, only to make him share in the public misery? If he loves his country, he will strive to relax the springs of government; if he miscarries, he will be undone; if he succeeds, he must expose himself, the prince, and his country to ruin. *Montesquieu's Works, Book IV, Chapter III.*

Despotic governments, where there are no fundamental laws, have no such kind of depository. Hence it is that religion has generally so much influence in those countries, because it forms a kind of permanent depository; and, if this cannot be said of religion, it may of the customs that are respected instead of laws. *Montesquieu's Works, Book II, Chapter V.*

From the nature of despotic power it follows, that the single person, invested with this power, commits the execution of it also to a single person. A man, whom his senses continually inform that he himself is everything, and his subject nothing, is naturally lazy, voluptuous, and ignorant. In consequence of this, he neglects the management of public affairs. But, were he to commit the administration to many, there would be continual disputes among them; each would form intrigues to be his first slave, and he should be obliged to take the reins into his own hands. *Montesquieu's Works, Book II, Chapter V.*

In the despotic government, the power is communicated entirely to the person intrusted with it. The vizir himself is the despotic prince; and each particular officer is the vizir. In monarchies, the power is

less immediately applied, being tempered by the monarch as he gives it. He makes such a distribution of his authority, as never to communicate a part of it without reserving a greater share to himself.

Hence, in monarchies, the governors of towns are not so dependent on the governors of the province as not to be still more so on the prince; and the private officers of military bodies are not so far subject to their general as not to owe still a greater subjection to their sovereign. *Montesquieu's Works, Book V, Chapter XVI.*

It is a received custom, in despotic countries, never to address any superior whomsoever, not excepting their kings, without making them a present. The Mogul never received the petitions of his subjects if they come with empty hands. These princes spoil their own favours. *Montesquieu's Works, Book V, Chapter XVII.*

In a republic, presents are odious, because virtue stands in no need of them. In monarchies, honour is much stronger incentive than presents. But, in a despotic government, where there is neither honour nor virtue, people cannot be determined to act but through hope of the conveniences of life.

It is in conformity to republican ideas, that Plato ordered those who received presents for doing their duty to be punished with death. "They must not take presents (says he) neither for good nor for evil actions."

A very bad law that was, among the Romans, which gave the magistrates leave to accept of small presents, provided they did not exceed one hundred crowns the whole year. They who receive nothing, expect nothing; they, who receive a little, soon covet more; till at length their desires swell to an exorbitant height. *Montesquieu's Works, Book V, Chapter XVII.*

It is a general rule, that great rewards, in monarchies and republics, are a sign of their decline, because they are a proof of their principles being corrupted, and that the idea of honour has no longer the same force in a monarchy, nor the title of citizen the same weight in a republic. *Montesquieu's Works, Book V, Chapter XIX.*

### Government of Aristocracies

As virtue is necessary in a popular government, it is requisite, also, under an aristocracy. True, it is that, in the latter, it is not so absolutely requisite.

The people, who, in respect to the nobility, are the same as the subjects with regard to a monarch, are restrained by their laws, they have, therefore, less occasion for virtue than the people in a democracy. But how are the nobility to be restrained? They, who are to execute the laws against their colleagues, will immediately perceive they are acting against themselves. Virtue is, therefore, necessary in this body, from the very nature of the constitution.

An aristocratical government has an inherent vigour, unknown to democracy. The nobles form a body, who, by their prerogative, and their own particular interest, restrain the people; it is sufficient, that there are laws in being, to see them executed. *Montesquieu's Works, Book III, Chapter IV.*

Moderation is, therefore, the very soul of this government; a moderation, I mean, founded on virtue, not that which proceeds from indolence and pusillanimity. *Montesquieu's Works, Book III, Chapter IV.*

In an aristocracy the supreme power is lodged in the hands of a certain number of persons. They are invested both with the legislative and executive authority; and the rest of the people are, in respect to them, the same as subjects of a monarchy in regard to the sovereign. *Montesquieu's Works, Book II, Chapter III.*

The best aristocracy is that which those who have no share in the legislature are so few and inconsiderable, that the governing party have no interest in oppressing them. Thus, when Antipater made a law at Athens, that whosoever was not worth two thousand drachms should have no power to vote, he formed, by this method, the best aristocracy possible; because this was so small a sum, as excluded very few, and not one of any rank or consideration in the city.

Aristocratic families ought, therefore, as much as possible, to level themselves, in appearance, with the people. The more an aristocracy borders on democracy, the nearer it approaches to perfection; and, in proportion as it draws towards monarchy, the more it is imperfect.

But the most imperfect of all is that in which the part of the people that obeys is in the state of civil servitude to those who command; as the aristocracy of Poland, where the peasants are slaved to the nobility. *Montesquieu's Works, Book II, Chapter IV.*

In aristocratical governments, there are two principle sources of disorder: executive inequality between the governors and the governed; and the same inequality between the different members of the body that governs. From these two inequalities hatreds and jealousies arise, which the laws ought ever to prevent or repress. *Montesquieu's Works, Book V, Chapter III.*

There are two pernicious things in an aristocracy; excess either of poverty or of wealth in the nobility. To prevent their poverty, it is necessary above all things, to oblige them to pay their debts in time. To moderate the excess of wealth, prudent and gradual regulations should be made; but no confiscations, no agrarian laws, no expunging of debts; these are productive of infinite mischief.

The laws ought to abolish the right of primogeniture among the nobles, to the end, that, by a continual division of the inheritances, their fortunes may be always upon a level. *Montesquieu's Works, Book V, Chapter VIII.*

### Government By Bureaucracy.

Mr. Bagehot thus points out some of the defects of this kind of government:

The defects of bureaucracy are, indeed, well known. It is a form of government which has been tried often enough in the world, and it is easy to show that, human nature being what it is in the long run is, the defects of a bureaucracy must in the long run be.

It is an inevitable defect that bureaucracies will care more for routine than for results; or, as Burke put it, "that they will think the

substance of business not to be much more important than the forms of it." Their whole education and all the habit of their lives make them do so. They are brought young into the particular part of the public service to which they are attached; they are occupied for years in learning its forms—afterward, for years too, in applying these forms to trifling matters. They are, to use the phrase of an old writer, "but the tailors of business; they cut the clothes, but they do not find the body." *Bagehot on The English Constitution.*

Not only does a bureaucracy thus tend to under-government, in point of quality; it tends to over-government, in point of quantity. The trained official hates the rude, untrained public. He thinks that they are stupid, ignorant, reckless—that they cannot tell their own interest—that they should have the leave of the office before they do anything. *Bagehot on The English Constitution.*

Voltaire says, somewhere, that, "the art of government is to make two-thirds of a nation pay all it possibly can pay for the benefit of the other third." This is realized in Germany by the functionary system. The functionaries are not there for the benefit of the people, but the people for the benefit of the functionaries. *Bagehot on The English Constitution.*

### **Russian Government**

Russia was originally a despotic government. Until recently, when the government was destroyed by a revolution during the European war, it was an absolute hereditary monarchy. The monarch was called the Czar. All governmental power of every description was vested in him. These powers, be they executive, legislative, or judicial, he executed through agencies appointed by himself. There was a Council of Empire, which was only a Consultation body, a part of the makers appointed by the Czar and part elective. There was another important deliberative body called the Duma, composed of four or five hundred members, elected for five years. Its functions however were merely consulting, and not legislative, or executive, or judicial. Another great body was called the Senate, through which the Czar governed. It was divided into various departments, some of which acted as courts of cessation, other sections were charged with the execution and promulgation of the laws. There was also the Holy Synod charged with the supervision of the ecclesiastical offices.

The Revolution during the World War resulted in the complete overthrow of the Czarenian government. A new form of government was set up called Bolshevism which is in truth not a government, but lack of government—a kind of anarchy or communism.



### French Government

The French government is a constitutional government, and called republican in form but is quite different from that of the United States. Its constitution consists of three written documents, adopted and promulgated by the National Assembly in 1875. These have been amended by statutes, called organic laws. It is in fact and in truth not a constitution in the sense of the Constitution of the United States. It serves as a Constitution of government but not of liberty. Napoleon I well said that "the French people love equality but care nothing for liberty." The government seems not to contemplate the liberty of the people, but only the equality of the people and the rights and powers of the government. It has a president who is elected but not by the people but by a body composed of members of both Chambers of Parliament. The term is seven years and is re-eligible, he cannot be of a family which has theretofore reigned in France. The president must act however through ministers. Every official act of the president must be counter-signed by a minister.

In theory the president appoints the ministers who hold office at his pleasure. In fact however they are appointed by the leader of the majority party of Deputies, and they resign when defeated. They are usually selected from the members of Parliament and if not are entitled to seats therein and must be heard if they desire to speak.

The number is fixed by the President and usually at about a dozen. Few have held office longer than three years. France may be said to be a parliamentary *republic*. The parliament consists of two houses, a Chamber of Deputies and a Senate. The members of the Chamber of Deputies must be chosen by universal suffrage which includes all male citizens twenty-one years of age and over, who have resided in France for six months before voting.

The New International Encyclopedia says:

The constitutional laws now of force make no provision concerning the composition and organization of the Senate, and but scant provision in reference to its powers. A Statute of 1884, which superseded the constitutional law on the subject, provides that it shall consist of 300 members, chosen by electoral colleges in the various departments. In each department this body consists: (1) of the deputies chosen in the particular department; (2) the members of the general council of the department; (3) the members of the councils of the several *arrondissements* in the department; and (4) delegates chosen by the municipal councils of all the communes of the department. The senators are apportioned among the several de-

partments according to population, the number in each varying from 1 to 10. In contrast to the method of choosing deputies, the senators from a given department are selected on a general ticket (*scrutin de liste*), each elector voting for the whole list. By statute the qualifications of senators are fixed at citizenship and the completion of the fortieth year. There are also certain disqualifications similar to those in the case of deputies. *The New International Encyclopedia*, Vol. IX, 143.

The constitution requires the chambers to assemble annually in January and to remain in session at least five months. The President may convoke them at an earlier date, and he is bound to do so if the demand is made by a majority of the members composing each chamber. They may also be adjourned by the President; but the duration of the adjournment cannot exceed one month and is not permitted to occur more than twice in a session. Bills may be presented in either chamber by private members or ministers, except that revenue measures must originate in the Chamber of Deputies. Whether the Senate has the right to amend the bills of this character is a disputed question. The Chamber of Deputies denies the right of the Senate to increase its revenue proposals, but the Senate has asserted its right successfully on a number of occasions. All bills must be referred to a special committee for consideration before being taken up in either house. A measure duly passed by both chambers is sent to the President for his approval. He has neither an absolute nor a qualified veto, although he may demand reconsideration of the measure, and a constitutional obligation rests upon the chambers to consider his objections; but if they repass the measure by the regular majority it becomes law in spite of the President's objections. *The New International Encyclopedia*, Vol. IX, 143.

The judicial system of France is a purely statutory creation, the only constitutional provision on the subject being that which relates to the constitution of the Senate as an extraordinary court for certain cases. By statute a hierarchial system of judicial and administrative courts has been created. Of the judicial courts, the highest is the Court of Cassation at Paris, which is composed of a first president, three presidents of sections, and forty-five judges or councilors. Next below this tribunal are the 26 Courts of Appeal, each composed of a president and four councilors and with territorial jurisdiction over several departments. They hear cases from the Courts of First Instance in the *arrondissements*, while these in turn hear appeals from decisions of the justices of the peace in the cantons (subdivisions of the *arrondissements*). These latter try civil cases and act as police judges for the disposal of petty offenses. For the trial of criminal cases involving penalties up to the imprisonment for five years, police correctional courts without juries are provided. More serious crimes are tried by courts of assizes, constituted periodically in each department, and including a jury of 12 men who are the sole judges of the question of guilt, and who fix the punishment. The ordinary civil courts are without juries, the judges alone deciding questions of fact as well as of the Republic, and their tenure, except in the bagavior. They can be removed only by the Court of Cassation. *The New International Encyclopedia*, Vol. IX, 144.

**German Government**

The German government is a hybrid. It is part democratic, part autocratic, and part monarchial. It is part federal, and part national. The chief offices are partly filled by election, partly by appointment and partly hereditary. The Empire consists of twenty-six States, four kingdoms, six great duchies, five duchies, seven principalities, three free cities and Alsace-Lorraine, all of which are under the King of Prussia, the most important state, by virtue of the Constitution. This king is Emperor of Germany and the office is hereditary. The States and dependences while federal are not at all equal. In fact all States and Empires are thus dominated and controlled by Prussia, which has the Emperor, and her Prime Minister, is the Chancellor of the Empire. Hence, the King of Prussia in truth and in fact rules and controls the whole of the Empire, both in civil and military affairs. Some of the States, Bavaria, Württemberg, and Baden, have privileges that the other states do not possess, in being exempt from Imperial excises and have their own postal and telegraph systems.

The Reichstag constitutes the national Parliament which represents the Empire as a whole, while the Bundesrat is the Federal Council, which represents the several States. The delegates composing the latter are chosen by the separate States. The members of the Reichstag are chosen by direct vote under universal suffrage and secret ballot. There are at present about four hundred members of the Reichstag but Prussia furnishes about three-fifths of the whole. The Bundesrat contains about sixty members of which Prussia furnishes merely one-third. The Federal Council or Bundesrat originates most all bills and measures though the Reichstag may under rules originate certain measures.

While the German government is a federation there is no States' right doctrine. The federation was not founded by the people or by the States voluntarily as was done in the United States. The Empire was founded as a war measure, and partly by coercion, or a kind of duress. While members of the Reichstag are elected by universal suffrage and therefore pertaining to a Democracy, yet it is controlled by Prussia, which in turn is controlled by its King and his Councillors, who in turn control the Empire.

It is well said in the *New International Encyclopedia* that the Reichstag may be the voice of Germany but it is not the will. Others have said that it is not a legislative body or a

Parliament but a national debating society. It is chiefly concerned in approving or disapproving the measures and policies prepared by the Emperor through his Chancellor. It may adopt or resist the measures proposed, if rejected the result would be to elect others who would execute the will of the Emperor, which is but the will of the King of Prussia.

The German government is, in fact, an absolute government and not a democracy. It is a central government and not a federation. It is an autocracy, ruled by Prussianism. It is more of a military government than a civil one. The people seem to know nothing of and to care nothing for individual liberty. The government is everything and the individual nothing. The people live and die for the government. The government is to rule the people but not to protect or to guarantee to them liberty or happiness. Socialism is very strong in Germany. It will sooner or later destroy the government as it has done in Russia.

The World War of course resulted in radical changes in the government. The above related to the government prior to the World War and not subsequent.

### **Tyranny in Government**

Mr. Bryce says of the abuse of power :

Tyranny consists in the wanton and improper use of strength by the stronger, in the use of it to do things which one equal would not attempt against another. A majority is tyrannical when it decides without hearing the minority, when it suppresses fair and temperate criticism on its own acts, when it insists on restraining men in matters where restraint is not required by the common interest, when it forces men to contribute money to objects which they disapprove, and which the common interest does not demand. The element of tyranny lies in the wantonness of the act, a wantonness springing from the sense of overwhelming power, or in the fact that it is misuse for one purpose of power granted for another. It consists not in the form of the act, which may be perfectly legal, but in the spirit and temper it reveals, and in the sense of injustice and oppression which it evokes in the minority.

Philosophers have long since perceived that the same tendencies to a wanton abuse of power which exist in a despot or a ruling oligarchy may be expected in a democracy from the ruling majority, because they are tendencies incidental to human nature. The danger was felt and feared by the sages of 1787, and a passage in the *Federalist* (No. L.) dwells on the safeguards which the great size of the Federal republic, and the diverse elements of which it will be composed, offer against the tendency of a majority to oppress a minority.

Since De Tocqueville delated upon this as the capital fault of the American government and people, Europeans, already prepared to ex-



pect to find the tyranny of the majority a characteristic sin of democratic nations, have been accustomed to think of the United States as disgraced by it, and on the strength of this instance have predicted it as a necessary result of the growth of democracy in the Old World. *Bryce on The American Commonwealth, Vol. I, 307-8.*

### Dangers of Plutocracy

Plutocracy used to be considered a form of oligarchy, and opposed to democracy. But there is a strong plutocratic element infused into American democracy<sup>1</sup>, and the fact that it is entirely unrecognized in constitutions makes it not less potent, and possibly more mischievous. The influence of money is one of the dangers which the people have always to guard against, for it assails not merely the legislatures but the party machinery, and its methods are as numerous as they are insidious. *Bryce's American Commonwealth, Vol. II, 479.*

### Anarchy and Rebellion

In 1787 Mr. Jefferson wrote to Col. John Smith as follows:

Wonderful is the effect of impudent and persevering lying. The British ministry have so long hired their gazeteers to repeat, and model into every form, lies about our being in anarchy, that the world has at length believed them, the English nation has believed them, the ministers themselves have come to believe them, and what is more wonderful, we have believed them ourselves. Yet where does this anarchy exist? Where did it ever exist, except in the single instance of Massachusetts? And can history produce an instance of rebellion so honorably conducted? I say nothing of its motives. *6 Jefferson's Writings (Mem. ed.), p. 372.*

What country before, ever existed a century and a half without a rebellion? And what country can preserve its liberties, if its rulers are not warned from time to time, that this people preserve the spirit of resistance? Let them take arms. The remedy is to set them right as to facts, pardon and pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time, with the blood of patriots and tyrants. It is its natural manure. Our convention has been too much impressed by the insurrection of Massachusetts; and on the spur of the moment, they are setting up a kite to keep the henyard in order. I hope in God, this article will be rectified before the new constitution is accepted. *6 Jefferson's Writings (Mem. ed.), p. 373.*

### Republican Governments

In a republic, the sudden rise of a private citizen to exorbitant power produces monarchy, or something more than monarchy. In the latter, the laws have provided for, or in some measure adapted themselves to, the constitution; and the principle of government

<sup>1</sup>Mr. Bryce in another place in his book, speaking of plutocracy in the American Senate, says that some members of that body occupied their places because they were rich, others were

rich because they held such places. It should be said, however, that this is no longer true of the Senate as it was when Mr. Bryce wrote.

checks the monarch; but, in a republic, where a private citizen has obtained an exorbitant power, the abuse of this power is much greater, because the laws foresaw it not, and consequently made no provision against it.

There is an exception to this rule, when the constitution is such as to have immediate need of a magistrate invested with an exorbitant power. Such was Rome with her state inquisitors: these are formidable magistrates, who restore, as it were by violence, the state to its liberty. *Montesquieu's Works, Book II, Chapter III.*

Virtue in a republic is a most simple thing; it is a love of the republic; it is a sensation, and not a consequence of acquired knowledge; a sensation that may be felt by the meanest as well as by the highest person in the state. When the common people adopt good maxims, they adhere to them steadier than those we call gentlemen. It is very rare that corruption commences with the former: nay, they frequently derive from imperfect light a stronger attachment to the established laws and customs.

The love of our country is conducive to a purity of morals, and the latter is again conducive to the former. The less we are able to satisfy our private passions, the more we abandon ourselves to those of a general nature. *Montesquieu's Works, Book V, Chapter III.*

We have observed, that, in a republic where riches are equally divided, there can be no such things as luxury; and, as we have shown, in the fifth book, that this equal distribution constitutes the excellency of the republican government, hence it follows, that the less luxury there is in a republic, the more it is perfect. There was none among the old Romans, none among the Lacedemonians; and, in republics where this equality is not quite lost, the spirit of commerce, industry, and virtue, renders every man able and willing to live on his own property, and consequently prevents the growth of luxury. *Montesquieu's Works, Book VII, Chapter II.*

Luxury is therefore absolutely necessary in monarchies; as it is also in despotic states. In the former, it is the use of liberty; in the latter, it is the abuse of servitude. A slave, appointed by his master to tyrannize over other wretches of the same condition, uncertain of enjoying, to-morrow, the blessings of to-day, has no other delicacy than that of glutting the pride, the passions, and voluptuousness, of the present moment.

Hence arises a very natural reflection. Republics end with luxury; monarchies with poverty. *Montesquieu's Works, Book VII, Chapter IV.*

In perusing the admirable treaties of Tacitus on the manners of the Germans, we find it is from that nation the English have borrowed the idea of their political government. This beautiful system was invented first in the woods.

As all human things have an end, the State we are speaking of will lose this liberty, will perish. Have not Rome, Sparta, and Carthage, perished?<sup>1</sup> It will perish when the legislative power shall be more corrupt than the executive. *Montesquieu's Works, Book XI, Chapter VI.*

<sup>1</sup>Another later, if not a greater sage, has said that those ancient republics perished because "Trial by Jury" was unknown to them.

Aristotle mentions the city of Carthage as a well regulated republic. Polybius tells us, that there was this inconvenience at Carthage, in the Second Punic war, that the senate had lost almost all their authority. We are informed, by Livy, that, when Hannibal returned to Carthage, he found that the magistrates and the principal citizens had abused their power, and converted the public revenues to their private emolument. The virtue, therefore, of the magistrates, and the authority of the senate, both fell at the same time; and all was owing to the same cause.

Every one knows the wonderful effects of the censorship among the Romans. There was a time when it grew burthensome; but still it was supported, because there was more luxury than corruption. Claudius weakened its authority; by which means the corruption became greater than the luxury, and the censorship dwindled away of itself. After various interruptions and resumptions, it was entirely laid aside till it became altogether useless; that is, till the reigns of Augustus and Claudius. *Montesquieu's Works, Book VIII, Chapter XIV.*

It is natural for a republic to have only a small territory; otherwise it cannot long subsist. In an extensive republic there are men of large fortunes, and consequently of less moderation: there are trusts too considerable to be placed in any single subject; he has interests of his own; he soon begins to think that he may be happy and glorious by oppressing his fellow-citizens; and that he may raise himself to grandeur on the ruins of his country.

In an extensive republic, the public good is sacrificed to a thousand private views; it is subordinate to exceptions, and depends on accidents. In a small one, the interest of the public is more obvious, better understood, and more within the reach of every citizen; abuses have less extent, and of course are less protected.

The long duration of the republic of Sparta was owing to her having continued in the same extent of territory after all her wars. The sole aim of Sparta was liberty; and the sole advantage of her liberty glory. *Montesquieu's Works, Book VIII, Chapter XVI.*

### Republican Form of Government Guaranteed

In *Luther v. Borden*, 7 How. 1, it was held that the question which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department, and when that department had decided, the courts were bound to take notice of the decision and follow it. *Miller's Const. p. 640.*

Mr. Webster's argument in that case took a wider sweep and contained a masterly statement of the American system of government, as recognizing that the people are the source of all political power, but that as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people; that the basis of representation is suffrage; that the right of suffrage must be protected and its exercise prescribed by previous law, and the results ascertained by some certain

rule; that through its regulated exercise each man's power tells in the Constitution of the Government and in the enactment of laws. *Miller's Const.* p. 641.

### Real Faults of Democracies

Mr. Bryce thus describes some faults:

The American masses have been obliged, both by democratic theory and by structure of their government, to proceed upon the assumption of their own competence. They have succeeded better than could have been expected. No people except the choicest children of England, long trained by the practice of local self-government at home and in the colonies before their revolt, could have succeeded half so well. Still the masses of the United States as one finds them to-day are no exception to the rule that some problems are beyond the competence of the average man. They can deal with broad and simple issues, especially with issues into which a moral element enters. They spoke out with a clear strong voice upon slavery, when at last it had become plain that slavery must either spread or vanish, and threw themselves with enthusiasm into the struggle for the Union. Their instinctive dislike for foreign annexation foiled President Grant's plan for acquiring San Domingo. Their sense of national and commercial honour has defeated more than one mischievous scheme for tampering with the public debt. But when a question of intricacy presents itself, requiring either keen foresight, exact reasoning, or wide knowledge, they are at fault. Questions relating to currency and coinage, free trade or of municipal governments, the control of corporations by the law, the method of securing purity of elections, these are problems which have continued to baffle them, just as the Free Soil question did before the war or the reconstruction of the revolted Southern States for a long time after it. *Bryce's American Commonwealth*, Vol. II, 455.

The Spoils System reminds us of the Machine and the whole organization of Rings and Bosses. This is the ugliest feature in the current politics of the country. Must it be set down to democracy? To some extent, yes. It could not have grown up save in a popular government; and some of the arrangements which have aided its growth, such as the number and frequency of elections, have been dictated by what may be called the narrow doctrinarism of democracy. But these arrangements are not essential to the safety of the government; and the other causes which have brought the machine politics of cities seem to be preventible causes. *Bryce's American Commonwealth*, Vol. II, 457.

In America it may be expected that the more active conscience of the people and the reform of the civil service will cut down, if they do not wholly eradicate, such corruption as now infests the legislative bodies, while better ballot and election laws may do the same for the constituencies.

A European critic may remark that this way of presenting the case ignores the evils and losses which defective government involves. "If," he will say, "the mass of mankind possess neither the knowledge



nor the leisure nor the skill to determine the legislation and policy of a great state, will not the vigour of the commonwealth decline and its resources be squandered? Will not a nation ruled by its average men in reliance on their own average wisdom be overtaken in the race of prosperity or overpowered in a warlike struggle by a nation of equal resources which is guided by its most capable minds?" The answer to this criticism is that America has hitherto been able to afford to squander her resources, and that no other state threatened her. With her wealth and in her position she can with impunity commit errors which might be fatal to the nations of Western Europe. *Bryce's American Commonwealth, Vol. II, 458-9.*

The commonest of the old charges against democracy was that it passed into ochlocracy. I have sought to show that this has not happened, and is not likely to happen in America. The features of mob-rule do not appear in her system, whose most characteristic faults are the existence of a class of persons using government as a means of private gain and the menacing power of wealth. Plutocracy, which the ancients contrasted with democracy, has shown in America an inauspicious affinity for certain professedly democratic institutions.

Perhaps no form of government needs great leaders so much as democracy. The fatalist habit of mind perceptible among the Americans needs to be corrected by the spectacle of courage and independence taking their own path, and not looking to see whether the mass are moving. Those whose material prosperity tends to lap them in self-complacency and dull the edge of aspiration, need to be thrilled by the emotions which great men can excite, stimulated by the ideals they present, stirred to a loftier sense of what national life may attain. In some countries men of brilliant gifts may be dangerous to freedom; but the ambition of American statesmen has been schooled to flow in constitutional channels, and the Republic is strong enough to stand any strain to which the rise of heroes may expose her. *Bryce's American Commonwealth, Vol. II, 460.*

### Supposed Faults of Democracies

Mr. Bryce thus states the case:

We have to ask first, how far the faults usually charged on democracy are present in America; next, why are the special faults which characterize it there? last, what are the strong points which it has developed?

The chief faults which philosophers, from Plato downwards to Mr. Robert Lowe, and popular repeating and caricaturing the dicta of philosophers, have attributed to democratic governments, are the following:

Weakness in emergencies, incapacity to act with promptitude and decision.

Fickleness and instability, frequent changes of opinion, consequent changes in the conduct of affairs and in executive officials.

Insubordination, internal dissensions, disregard of authority, a frequent resort of violence, bringing on anarchy which ends in military tyranny.

A desire to level down, and intolerance of greatness.

Tyranny of the majority over the minority.

A love of novelty: a passion for changing customs and destroying old institutions.

Ignorance and folly, producing a liability to be deceived and misled; consequent growth of demagogues playing on the passions and selfishness of the masses. *Bryce's American Commonwealth, Vol. II, 436-7.*

A demagogue of greater talent may aspire to some high executive office; if not to the Presidency, then perhaps a place in the Cabinet, where he may practically pull the wires of a President whom he has put into the chair. Failing either of these, he aims at the governorship of his State or the mayoralty of a great city. In no one of these positions can he do permanent harm. The Federal executive has no influence on legislation, and even in foreign policy and in the making of appointments requires the consent of the Senate. That any man should acquire so great a hold on the country as to secure the election of two Houses of Congress subservient to his will, while at the same time securing the Presidency or Secretaryship of State for himself, is an event too improbable to enter into calculation. Nothing approaching it has been seen since the days of Jackson. The size of the country, the difference between the States, a hundred other causes, make achievements possible enough in a European country all but impossible here. *Bryce's American Commonwealth, Vol. II, 448.*

Of the faults traditionally attributed to democracy one only is fairly chargeable on the United States; that is to say, is manifested there more conspicuously than in the constitutional monarchies of Europe. This is the disposition to be lax in enforcing laws disliked by any large part of the population, and to be too indulgent to offenders and law-breakers generally. *Bryce's American Commonwealth, Vol. II, 449.*

### Democracy the Strength of America

The people are profoundly attached to the form which their natural life has taken. The Federal Constitution is, to their eyes, an almost sacred thing, an Ark of the Covenant, whereon no man may lay rash hands. Everywhere in Europe one hears schemes of radical change freely discussed. There is a strong monarchial party in France, a republican party in Italy and Spain. There are anarchists in Germany and Russia. Even in England, it is impossible to feel confident that any one of the existing institutions of the country will be standing fifty years hence. But in the United States the discussion of political problems busies itself with details and assumes that the main lines must remain as they are forever. This conservative spirit, jealousy watchful even in small matters, sometimes prevents reforms, but it assures to the people an easy mind, and a trust in their future, which they feel to be not only present satisfaction but a reservoir of strength. *Bryce's American Commonwealth, Vol. II, 461.*

Everything that government, as the Americans have hitherto understood the term, can give them, the poor have already, political power, equal civil rights, a career open to all citizens alike, not to

speak of that gratuitous higher as well as elementary education which on their own economic principles the United States might have abstained from giving, but which political reasons have led them to provide with so unstinting a hand. Hence the poor have had nothing to fight for, no grounds for disliking the well-to-do, no complaints to make against them. The agitation of the last few years has been directed, not against the richer classes generally, but against incorporated companies and a few individual capitalists, who have not unfrequently abused the powers which the privilege of incorporation conferred upon them, or employed their wealth to procure legislation opposed to the public interests. Where language has been used like that with which France and Germany are familiar, it has been used, not by native Americans, but by newcomers, who bring their Old World passions with them.<sup>1</sup> Property is safe, because those who hold it are far more numerous than those who do not: the usual motives for revolution vanish; universal suffrage, even when vested in ignorant newcomers, can do comparatively little harm, because the masses have obtained everything which they could hope to attain except by a general pillage. And the native Americans, though the same cannot be said of some of the recent immigrants, are shrewd enough to see that the poor would suffer from such pillage no less than the rich. *Bryce's American Commonwealth, Vol. II, 466.*

Some American panegyrists of democracy have weakened their own case by claiming all the triumphs which modern science has wrought in a land of unequalled natural resources as the result of a form of government. An active European race would probably have made America rich and prosperous under any government. But the volume and the character of the prosperity attained may be in large measure ascribed to the institutions of the country. *Bryce's American Commonwealth, Vol. II, 467.*

The successful establishment and support of religious institutions—churches, seminaries, and religious charities—upon a purely voluntary system, is an unprecedented achievement of the American democracy. In only three generations American democratic society has effected the complete separation of Church and State, a reform which no other people has ever attempted. Yet religious institutions are not stinted in the United States; on the contrary, they abound and thrive, and all alike are protected and encouraged, but not supported, by the State. *Bryce's American Commonwealth, Vol. II, 468.*

The University of Strasburg was lately established by an imperial decree, and is chiefly maintained out of revenue of the State. Har-

<sup>1</sup>American Democracy has suffered and is suffering from foreign immigration. Foreigners coming to the United States mistake often liberty for licentiousness; freedom for lawlessness; democracy for socialism and anarchy. They seem unable to understand that governments are to protect the people in the enjoyment of liberty and freedom, and not to persecute and tyrannize them. They seem to think that the sole object of government is to oppress the people or masses there-

of for the benefit of select classes.

For this reason their object and purpose is to destroy all forms of government, and to substitute therefor the will of the rabble which is usually made up of the very worst elements of society.

They appeal always to prejudice and passion and not to reason, the ignorant and credulous are ready and easy victims of the clamor of these foreign agitators and mal and discontented.

vard University has been two hundred and fifty years in growing to its present stature, and is even now inferior at many points to the new University of Strasburg; but Harvard is the creation of thousands of persons, living and dead, rich and poor, learned and simple, who have voluntarily given it their time, thought, or money, and lavished upon it their affection; Strasburg exists by the mandate of the ruling few directing upon it a part of the product of ordinary taxation. Like the voluntary system in religion, the voluntary system in the higher education buttresses democracy; each demands from the community a large outlay of intellectual activity and moral vigour. *Bryce's American Commonwealth, Vol. II, 469.*

Democracy has not only taught the Americans how to use liberty without abusing it, and how to secure equality; it has also taught them fraternity. That word has been out of the fashion in the Old World, and no wonder, considering what was done in its name in 1793, considering also that it still figures in the programme of assassins. Nevertheless there is in the United States a sort of kindness, a sense of human fellowship, a recognition of the duty of mutual help owed by man to man, stronger than anywhere in the Old World, and certainly stronger than in the upper or middle classes of England, France or Germany. The natural impulse of every citizen in America is to respect every other citizen, and to feel that citizenship constitutes a certain ground of respect. The idea of each man's equal rights is so fully realized that the rich or powerful man feels it no indignity to take his turn among the crowd, and does not expect any difference from the poorest. An employer of labour has, I think, a keener sense of his duty to those whom he employs than employers have in Europe. *Bryce's American Commonwealth, Vol. II, 471.*

Mr. Bryce, in speaking of American democracy as available for Europe, says:

America has in some respects anticipated European nations. She is walking before them along a path which they may probably follow. She carried behind her, to adopt a famous simile of Dante's, a lamp whose light helps those who come after more than it always does herself, because some of the dangers she had passed through may not recur at any other point in her path; whereas they, following in her footsteps, may stumble in the same stony places, or be entangled in the quagmires from which she suffered. *Bryce's American Commonwealth, Vol. II, 475.*

### Democracy—Equality of the People

The principle of democracy is corrupted, not only when the spirit of equality is extinct, but likewise when they fall into a spirit of extreme equality, and when each citizen would fain be upon a level with those whom he has chosen to command him. Then the people, incapable of bearing the very power they have delegated, want to manage everything themselves, to debate for the senate, to execute for the magistrate, and to decide for the judges.

When this is the case virtue can no longer subsist in the republic. The people are desirous of exercising the functions of the magistrates;



who cease to be revered. The deliberations of the senate are slighted: all respect is then laid aside for the senators, and consequently for old age, there will be none presently for parents: deference to husbands will be likewise thrown off, and submission to masters. This licentiousness will soon become general, and the trouble of command be as fatiguing as that of obedience. *Montesquieu's Works, Book VIII, Chapter II.*

We find, in *Xenophon's Banquet*, a very lively description of a republic in which the people abused their equality. Each guest gives, in his turn, the reason why he is satisfied. "Content I am," says Chamides, "because of my poverty. When I was rich, I was obliged to pay my court to informers knowing I was more liable to be hurt by them than capable of doing them harm. The republic constantly demanded some new tax of me; and I could not decline paying. Since I am grown poor, I have acquired authority; nobody threatens me; I rather threaten others. I can go or stay where I please. The rich already rise from their seats and give me the way. I am a king; I was before a slave: I paid taxes to the republic; now it maintains me: I am no longer afraid of losing, but I hope to acquire." *Montesquieu's Works, Book VIII, Chapter II.*

Democracy hath, therefore, two excesses to avoid; the spirit of inequality, which leads to aristocracy or monarchy, and the spirit of extreme equality, which leads to despotic power, as the latter is completed by conquest. *Montesquieu's Works, Book VIII, Chapter II.*

As distant as heaven is from earth, so is the true spirit of equality from that of extreme equality. The former does not imply that every body should command, or that no one should be commanded, but that we obey or command our equals. It endeavours not to shake off the authority of a master, but that its masters should be none but its equals.

In the state of nature indeed, all men are born equal; but they cannot continue in this equality: society makes them lose it, and they recover it only by the protection of the laws.

Such is the difference between a well regulated democracy and one that is not so, that in the former, men are equal only as magistrates, as senators, as judges, as fathers, as husbands, or as masters.

The natural place of virtue is near to liberty; but it is not nearer to excessive liberty than to servitude. *Montesquieu's Works, Book VIII, Chapter III.*

### Pure and Representative Democracies

Garner, in his late work on Political Science, says: "Democracies are of two kinds, pure or direct, and representative and indirect. A pure democracy is one in which the will of the state is formulated and expressed directly and immediately through the people acting in their primary capacity. A representative democracy is one in which the will of the state is ascertained and expressed through the agency of a small and select number who act as the representatives of the people. A pure democracy is practicable only in small states where the voting population may be assembled for purposes of legislation, and where the collective needs of the people are few and simple. In

large and complex societies where the legislative wants of the people are numerous, the very necessities of the situation make government by the whole body of the citizens a physical impossibility. . . . What is in substance a representative democracy is sometimes called a republican or representative government. . . . A pure or direct type exists in too narrow and restricted a form and is too impracticable to merit extended consideration. Sufficient for the needs of the few small communities where it still survives, it is wholly unsuited to the conditions of the complex states of to-day." *The Constitutional Review, Vol. I, 16.*

Madison, in expounding the Constitution, in the *Federalist*, said: "A pure democracy can admit of no cure for the mischiefs of factions. A common passion of interest will in almost every case be felt by a majority of the whole." *The Constitutional Review, Vol. I, 17.*

Webster, in his speech on the Rhode Island government, in 1848, said: "The people cannot act daily as the people. They must establish a government and invest it with as much of sovereign power as the case requires. . . . The exercise of legislative power and the other powers of government immediately by the people themselves is impracticable." *The Constitutional Review, Vol. I, 17.*

Leckey, in his "Democracy and Liberty," says: "One thing is absolutely essential to its safe working, namely, a written constitution securing property and contracts; placing difficulties in the way of organic change; restricting the power of the majorities, and preventing outbursts of mere temporary discontent and mere casual conditions from overturning the main pillars of the state."

Mill, in his *Essay on Government*, says: "In this great discovery of modern times, the system of representation, the solution of all the difficulties, both speculative and practical, will perhaps be found. If it cannot, we seem to be forced upon the extraordinary conclusion that popular government is impossible. . . . The community can act only when assembled, and when assembled it is incapable of acting. The community, however, can choose representatives."

Tucker, in his work on the Constitution, says: "Representation is the modern method by which the will of a great multitude may express itself through an elected body of men for deliberation in law-making. It is the only practicable way by which a large country can give expression to its will in deliberate legislation. Give suffrage to the people; let law-making be in the hands of their representatives; and make the representatives responsible at short periods to the popular judgment, and the rights of men will be safe, for they will select only such as will protect their rights and dismiss those who, upon trial, will not. . . . The government of the numerical majority is the mechanism of brute force." *The Constitutional Review, Vol. I, 18.*

Judge Young, in an article in the *Constitutional Review*, propounds these questions as to a change in our government from the Representative to a pure democracy:

Are we ready to submit ourselves to the doctrine that the majority as they express themselves from time to time are always right?

Are we ready to agree that no obstructions should be placed upon the dominating will of an existing majority? And by the majority we do not mean a majority of all the people, but of the electors. The electors are but one-fifth of the people and a majority at any election means no more than one-tenth of the people, who are affected. Are we ready to say that all public officers shall follow the wish of the majority of electors? That courts shall construe statutes and constitutional provisions in accordance with the will of the majority as they shall express it at any time? Are we ready to say that controversies shall be decided by our judicial tribunals as the majority of the electorate shall will? Will we agree that the guarantee to individuals and to minorities contained in the Federal Constitution shall be subject to the control of an impassioned majority?

Are we ready, at the command of a majority of electors to give up our religious freedom and agree to the establishment of a state religion? Are we prepared to surrender the rights of free speech and the freedom of the press—the right to peaceably assemble and the right to petition—whenever a prevailing majority of electors shall so decide? Will we permit a majority to deny to us the great liberty writ, the writ of habeas corpus? Shall we agree that a majority may pass bills of attainder and make acts which are innocent to-day, crimes to-morrow? Are we ready to agree that a majority may provide that soldiers shall be quartered in our homes without our consent in times of peace? That our persons and houses and effects shall not be free from unreasonable searches and seizures? That warrants may issue without probable cause—that we may be held to answer for crimes without a presentment—that we may be put twice in jeopardy for the same offense—that we may be compelled to be witness against ourselves in criminal cases—that our property may be taken for public use without just compensation—that we may be deprived of life, liberty and property without due process of law—that we shall have no right to speedy and public trial by an impartial jury—that we shall have no right to be confronted by the witnesses against us—that we shall have no right to process to compel the attendance of witnesses in our favor, or to have counsel to aid us in our defense—that excessive bail may be required and cruel and unusual punishments may be inflicted?

These are some of the rights guaranteed to us by the Federal Constitution, which the promoters of the present revolution ask us to imperil by adopting the purely democratic form of government.

Our ship of state is proof against external force. It is not proof against internal violence. *The Constitutional Review*, Vol. I, 21, 22.

## Equalities Under Government of Democracies

Montesquieu thus describes Democracies:

The love of equality, in a democracy, limits ambition to the sole desire, to the sole happiness, of doing greater services to our country than the rest of our fellow-citizens. They cannot all render her equal services, but they all ought to serve her with equal alacrity. At our coming into the world, we contract an immense debt to our country, which we can never discharge. *Montesquieu's Works*, Book V, Chapter III.

It is not sufficient, in a well-regulated democracy, that the divisions of land be equal; they ought also to be small, as was customary among the Romans. "God forbid," said Curius to his soldiers, "that a citizen should look upon that as a small piece of land which is sufficient to maintain him." *Montesquieu's Works, Book V, Chapter VI.*

An equal division of lands cannot be established in all democracies. There are some circumstances in which a regulation of this nature would be impracticable, dangerous, and even subversive of the constitution. We are not always obliged to proceed to extremes. If it appear that this division of lands, which was designed to preserve the people's morals, does not suit with democracy, recourse must be had to other methods. *Montesquieu's Works, Book V, Chapter VII.*

### Democracy and Autocracy Compared

When the body of the people is possessed of the supreme power, this is called a *democracy*. When the supreme power is lodged in the hands of a part of the people, it is then an *autocracy*.

In a democracy the people are in some respects the sovereign, and in others the subject.

There can be no exercise of sovereignty but by their suffrages, which are their own will: now, the sovereign's will is the sovereign himself. The laws, therefore, which establish the right of suffrage, are fundamental to this government. And indeed it is as important to regulate, in a republic, in what manner, by whom, to whom, and concerning what, suffrages are to be given, as it is, in a monarchy, to know who is the prince, and after what manner he ought to govern. *Montesquieu's Works, Book II, Chapter II.*

The people, in whom the supreme power resides, ought to have the management of everything within their reach: what exceeds their abilities must be conducted by their ministers.

But they cannot properly be said to have their ministers, without the power of nominating them: it is therefore a fundamental maxim, in this government, that the people should choose their ministers; that is, their magistrates.

They have occasion, as well as monarchs, and even more so, to be directed by a council or senate. But, to have a proper confidence in these, they should have the choosing of the members; whether the election be made by themselves, as at Athens; or by some magistrate, deputed for the purpose, as on certain occasions was customary at Rome.

The people are extremely well qualified for choosing those whom they are to intrust with part of their authority. They have only to be determined by things to which they cannot be strangers, and by facts that are obvious to sense. *Montesquieu's Works, Book II, Chapter II.*

The law which determines the manner of giving suffrage is likewise fundamental in a democracy. It is a question of some importance, whether the suffrages ought to be public or secret. Cicero observes, that the laws which rendered them secret, towards the close of the republic, were the cause of its decline. *Montesquieu's Works, Book II, Chapter II.*



It is likewise a fundamental law, in democracies, that the people should have the sole power to enact laws. And yet there are a thousand occasions on which it is necessary the senate should have a power of decreeing: nay, it is frequently proper to make some trial of law before it is established. The constitutions of Rome and Athens were excellent. The decrees of the senate had the force of laws for the space of a year, but did not become perpetual till they were ratified by the consent of the people. *Montesquieu's Works, Book II, Chapter II.*

### Local Self-Government

Dr. Lieber thus describes Local Self-Government:

Jefferson said, in 1798, that "the residuary rights are reserved to their (the American states') *own self-government.*" The term is now freely used both in England and America. In the former country we find a book on Local Self-Government; in ours, Daniel Webster said, on May 22d, 1852, in his Faneuil Hall speech: "But I say to you and to our whole country, and to all the crowned heads and aristocratic powers and feudal systems that exist, that it is to self-government, the great principle of popular representation and administration—the system that lets in all to participate in the counsels that are to assign the good or evil to all—that we may owe what we are and what we hope to be."

Earl Derby, when premier, said, in the house of lords, that the officers sent from abroad to assist in the funeral of the Duke of Wellington would "bear witness back to their own country how safely and to what extent a people might be relied upon in whom the strongest hold of their government was their own reverence and respect for the free institutions of their country, and the principles of popular self-government controlled and modified by constitutional monarchy." *Lieber's Civil Liberty and Self-Government, 247.*

American liberty belongs to the great division of Anglican liberty. It is founded upon the checks, guarantees, and self-government of the Anglican race. The trial by jury, the representative government, the common law, self-taxation, the supremacy of the law, publicity, the submission of the army to the legislature, and whatever else has been enumerated, form part and parcel of our liberty. There are, however, features and guarantees which are peculiar to ourselves, and which, therefore, we may say constitute American liberty. They may be summed up, perhaps, under these heads; republican federalism, strict separation of the state from the church, greater equality and acknowledgment of abstract rights in the citizen, and a more popular or democratic cast of the whole polity.

The Americans do not say that there can be no liberty without republicanism, nor do they, indeed, believe that wherever a republican of kingless government exists, there is liberty. The founders of our own independence acknowledged that freedom can exist under a monarchical government, in the very act of their declaration of independence. *Lieber's Civil Liberty and Self-Government, 256.*

On the 12th of June, 1823, Mr. Jefferson wrote the following to William Johnson, one of the Justices of the Supreme Court of the United States:

The States supposed that by their tenth amendment, they had secured themselves constructive powers. They were not lessoned yet by Cohen's case, nor aware of the slipperiness of the eels of the law. I ask for no straining of words against the General Government, nor yet against the States. I believe the States can best govern our home concerns, and the General Government our foreign ones. I wish, therefore, to see maintained that wholesome distribution of powers established by the Constitution for the limitation of both; and never to see all offices transferred to Washington, where, further withdrawn from the eyes of the people, they may more secretly be bought and sold as at market.

Mr. Jefferson believed in local self-government, as well as a federal government. He thus describes and defines the powers:

These wards, called townships in New England, are the vital principle of their governments, and have proved themselves the wisest invention ever devised by the wit of man for the perfect exercise of self-government, and for its preservation. We should thus marshal our government into, 1, the general federal republic, for all concerns foreign and federal; 2, that of State, for what relates to our own citizens exclusively; 3, the county republics, for the duties and concerns of the county; and 4, the ward republics, for the small, and yet numerous and interesting concerns of the neighborhood; and in government, as well as in every other business of life, it is by division and subdivision of duties alone, that all matters, great and small, can be managed to perfection. And the whole is cemented by giving to every citizen, personally, a part in the administration of the public affairs. *15 Jefferson's Writings (Mem. ed.), p. 38.*

Judge Dillon thus speaks of American Local Self-Government:

In this country the system of decentralizing political power, and of intrusting the direction of local affairs to the local constituencies, has from the earliest colonial periods been carried to a much greater extent than in England. As you pass from one end of this country to the other, alike in the older regions and in the newest organized settlements, you will see the affairs of each road district, school-district, township, county, village, and city locally self-managed, including the administration of local justice. Every township in the United States has a local court, with power to summon a jury of vicinage, thereby bringing justice home to the business and bosoms of the people, and making it their own affair. We are somewhat apt to look with disdain upon the courts held by justices of the peace; but in reality we have few more useful institutions. The eyes of the ordinary justice have not, indeed, been couched to the "gladsome light of jurisprudence." He may be prone to make technical mistakes; but

in general he manages, by himself or the jury, to work out substantial justice in the decision of the disputes arising out of the every-day affairs of the people. *The Law and Jurisprudence of England and America, 160-1.*

The assembly of citizens here described are mere local assemblies, not assemblies of a nation, but a district; and it seems not a little remarkable that this learned writer should have said that such meetings of the whole body of citizens in their primary capacity as men could be seen in no other part of the world. For more than two hundred years New England town-meetings had been continuously held, where every citizen was entitled to meet and vote,—to determine and settle their local affairs, and to elect the public officers by which those affairs were to be administered for the coming year. And in essence the same powers are now exercised by the whole body of the citizens of the thousands of municipal and public corporations in the American States. *The Laws and Jurisprudence of England and America, 163.*

Mr. Bryce says of local self-government:

Nothing has more contributed to give strength and flexibility to the government of the United States, or to train the masses of the people to work their democratic institutions, than the existence everywhere in the northern States of self-governing administrative units, such as townships, small enough to enlist the personal interest and be subject to the personal watchfulness and control of the ordinary citizen. Abuses have indeed sprung up in the cities, and in the case of the largest among them have become formidable, partly because the principle of local control has not been sufficiently adhered to. Nevertheless the system of local government as a whole has been not merely beneficial, but indispensable, and well deserves the study of those who in Europe are alive to the evils of centralization, and perceive that those evils will not necessarily diminish with a further democratization of such countries as England, Germany and Italy. I do not say that in any of the other great European states the mass of the rural population is equally competent with the American to work such a system: still it presents a model towards which European institutions ought to tend, while the examples of cities like New York and Philadelphia offer salutary warnings of what municipal governments ought to avoid. *Bryce's American Commonwealth, Vol. II, 478.*

Law will never be strong or respected unless it has the sentiment of the people behind it. If the people of a State make bad laws, they will suffer for it. They will be the first to suffer. Let them suffer. Suffering, and nothing else, will implant that sense of responsibility which is the first step to reform. Therefore let them stew in their own juice: let them make their bed and lie upon it. If they drive capital away, there will be less work for the artisans: if they do not endorse contracts, trade will decline, and the evil will work out its remedy sooner or later. Perhaps it will be later rather than sooner: if so, the experience will be all the more conclusive. It is said that the minority of wise and peaceable citizens may suffer? Let them

exert themselves to bring their fellows round to better mind. Reason and experience will be on their side. We cannot be democrats by halves; and where the self-government is given, the majority of the community must rule. Its rule will in the end be better than that of any external power. No doctrine more completely pervades the American people, the instructed as well as the uninstructed. Philosophers will tell you that it is the method by which Nature governs, whose laws carry their own sanction with them. Divines will tell you that it is the method by which God governs: God is a righteous Judge and God is provoked every day, yet He makes His sun to rise on the evil and the good, and sends rain upon the just and the unjust, He does not directly intervene to punish faults, but leaves sin to bring its own appointed penalty. Statesmen will point to the troubles which followed the attempt to govern the unconquered seceding States, first by military force and then by keeping a great part of their population disfranchised, and will declare that such evils as still exist in the South are far less grave than those which the denial or ordinary self-government involved. "So," they pursue, "Texas and California will in time unlearn their bad habits and come out right if we leave them alone: Federal interference, even had we the machinery needed for prosecuting it, would check the natural process by which the better elements in these raw communities are purging away the maladies of youth, and reaching the settled health of manhood."

A European may say that there is a dangerous side to this application of democratic faith in local majorities and in *laissez aller*. Doubtless there is: yet those who have learnt to know the Americans will answer that no nation so well understands its own business. *Bryce's American Commonwealth, Vol. I, 332-3.*

As, in a country of liberty, every man who is supposed a free agent ought to be his own governor, the legislative power should reside in the whole body of the people. But, since this is impossible in large states, and in small ones is subject to many inconveniences, it is fit the people should transact by their representatives what they cannot transact by themselves.

The inhabitants of a particular town are much better acquainted with its wants and interests than with those of other places; and are better judges of the capacity of their neighbors than that of the rest of their countrymen. The members, therefore, of the legislature should not be chosen from the general body of the nation; but it is proper, that, in every considerable place, a representative should be elected by the inhabitants.

The great advantage of representatives is, their capacity of discussing public affairs. For this, the people collectively are extremely unfit, which is one of the chief inconveniences of a democracy. *Montesquieu's Works, Book XI, Chapter VI.*

The Supreme Court of United States thus states the doctrine:

Experience has shown that in a country of great territorial extent and varied interests, peace and lasting prosperity can exist with a



civilized people only when local affairs are controlled by local authority, and, at the same time, there are lodged in the general government of the country such sovereign powers, as will enable it to regulate the intercourse of its people with foreign nations and between the several communities, protect them in all their rights in such intercourse, defend the country against invasion and domestic violence, and maintain the supremacy of the laws throughout its whole domain. This principle the framers of the constitution acted upon in establishing the government of the Union, by leaving unimpaired the power of the states to control all matters of local interest, and creating a new government of sovereign powers for matters of general and national concern. They thus succeeded in reconciling local self-government, or home rule, with the exercise of national sovereignty for national purposes. Under this dual government each state may pursue the policy best suited to its people and resources, though unlike that of another state. And yet there can be no violent conflicts so long as the central government exercises its rightful power, and secures them against foreign invasion and internal violence, and extends to the citizens of each state protection in the others. *134 U. S. 731.*

### **Institutional Self-Government**

Mr. Lieber, in his book on Civil Liberty and Self-Government, has probably best described this form of government. He says :

By institutional self-government is meant that popular government which consists in a great organism of institutions or a union of harmonizing systems of laws instinct with self-government. It is essentially of a co-operative character, and thus the opposite to centralism. It is articulated liberty, and thus the opposite to an inarticulated government of the majority. It is of an inter-guaranteeing, and, consequently, interlimiting character, and in this aspect the negation of absolutism. It is a self-evolving and genetic nature, and thus is contra-distinguished from governments founded on extra-popular principles, such as divine right. Finally, institutional self-government is, in the opinion of our race, and according to our experience, the only practical self-government, or self-government carried out in the realities of life, and is thus the opposite of a vague or theoretical liberty, which proclaims abstractions, but, in reality, cannot disentangle itself from the despotism of one part over another, however permanent or changing the ruling part may be.

Institutional self-government is the political embodiment of self-reliance and mutual acknowledgment of self-rule. It is in this view the political realization of equality.

Institutional self-government is the only self-government which makes it possible to unite *self-government* and *self-government*.

According to the Anglican view, institutional self-government consists in the fact that all the elementary parts of the government, as well as the highest and most powerful branches, consist in real institutions, with all the attributes which have been ascribed to an institution in the highest sense of the term. It consists, farther, in

the unstinted freedom and fair protection which are granted to institutions of all sorts, commercial, religious, cultural, scientific, charitable, and industrial, to germinate and to grow—*provided they are moral and do not invade the equal rights of others*. It receives its aliment from a pervading spirit of self-reliance and self-respect—the real afflatus of liberty.

It does not only require that the main functions of the government—the legislative, the judicial, and the executive—be clearly divided, but also that the legislature and the judiciary be bona fide institutions. The first French constituent assembly pronounced the separation of the three powers, and was obliged to do so, since it intended to demolish the absolutism which had grown up under the bourbons; but so long as there existed an absolute power, no matter of what name, that could dictate, liberty was not yet obtained. Indeed, it may be said that an efficient division of power cannot exist, unless the legislature and the judiciary form real institutions, in our sense of the term. *Lieber's Civil Liberty and Self-Government, 319-20.*

*Self-government, to be of a penetrative character, requires the institutional self-government of the county or district; it requires that everything which, without general inconvenience, can be left to the circle to which it belongs, be thus left to its own management; it consists in the presenting grand jury, in the petty jury, in the fact that much which is called on the European continent the administrative branch be left to the people. It requires, in one word, all the local appliances of government which are termed local self-government; and Niebuhr says that British liberty depends at least as much on these as on parliament, and in contradistinction to them he calls the governments of the continent Staats-Regierungen, (state governments, meaning governments in which all detail is directed by the general and supreme power). *Lieber's Civil Liberty and Self-Government, 321.**

The words of Mr. Everett are doubtless true, that "the French, though excelling all other nations of the world in the art of communicating for temporary purposes with savage tribes, seem, still more than the Spaniards, to be destitute of the august skill required to found new states. I do not know that there is such a thing in the world as a colony of France growing up into a prosperous commonwealth. A half a million of French peasants in Lower Canada, tenaciously brought from Normandy two centuries ago, and a third part of that number of planters of French descent in Louisiana, are all that is left to bear witness to the amazing fact that not a century ago France was the mistress of the better half of North America." Are they succeeding in establishing a vigorous colony in Algeria? It seems not; and the question presents itself, what is the reason of this inability of so intelligent a nation as the French to establish flourishing colonies? I believe that the chief reason is this: The French are thoroughly wedded to centralism, and eminently uninstitutional in their character. They want government to do everything for them. They are peculiarly destitute of self-reliance in all public and communal matters. They do not know self-government; they cannot im-

part it. Every Frenchman's mental home is Paris, even while residing in France; as to a colonial life, he always considers it a mere exile.

The assimilative power and transmissible character of the institution are closely connected with its tenacity and formative character. Few things in all history seem to me more striking, and, if analyzed, more instructive, than the fact that Great Britain, though monarchical in name, and aristocratic in many points, plants freedom wherever she sends colonies, and becomes thus the great mother of republics; while France, with all her domestic tendencies, her worship of equality and repeated proclamations of a republic, has never approached nearer than setting aside a ruling dynasty; her colonies are, politically speaking, barren dependencies. They do not bloom into empires. The colonies of Spain also teach a grave lesson on this subject. *Lieber's Civil Liberty and Self-Government*, 330-1.

The power by which institutional self-government assimilates various and originately discordant elements is forcibly shown in the United States, where every year several hundred thousand emigrants arrive from countries under different governments. The institutions of our country soon absorb and assimilate them as integral parts of our polity. In no other political system of which liberty forms any part, could this be done. Imagine an influx of foreigners in a country like France when she called herself republican, and the danger of so large a body of foreigners would soon be perceived. It would be an evil day for the United States and for the emigrants, if our institutions were to be broken up and popular absolutism erected on the ruins of our institutional liberty. We, of all nations on earth, are most interested in the vigorous life and healthful development of institutional self-government. No nation has as much reason to shun inarticulated equality and barren centralization as ourselves. *Lieber's Civil Liberty and Self-Government*, 332.

Liberty is a thing that grows, and institutions are its very garden beds. There is no liberty which as a national blessing has leaped into existence in full armor like Minerva from the head of Jove. Liberty is crescive in its nature. It takes time, and is difficult, and like all noble things. "Things noble are hard," was the favorite saying of Socrates, and liberty is the noblest of all things. It must be defended, like a mere capital on a column; it must pervade the whole body. If the Emperor of China were to promulgate one of the charters of our states for his empire, it would be like hanging a gold collar around the neck of a camel.

Liberty must grow up with the whole system; therefore we must begin at once, where it does not exist, knowing that it will take time for perfection, and not indeed discard it, because it has not yet been commenced. That would be like giving up the preparation of a meal, because it has not been commenced in time. Let institutions grow, and sow them at once.

We see, then, how unphilosophical were the words of the present Emperor of the French to the assembled bodies of state in February, 1853, when he said: "Liberty has never aided in founding a durable edifice; liberty crowns it when it has been consolidated by time."

History denies it; political philosophy and common sense alike contradict it. Liberty may be planted where despotism has reigned, but it can be done only by much undoing, and breaking down; by a great deal of rough ploughing. We cannot prepare a people for liberty by centralized despotism, any more than we can prepare for light by destroying the means of vision. Nowhere can liberty develop itself out of despotism. It can only chronologically follow the rule of absolutism; and if it does so, it must begin with eliminating its antagonistic government. Every return to concentrated despotism, therefore, creates an additional necessity of revolution, and throws an increased difficulty in the way of obtaining freedom. *Lieber's Civil Liberty and Self-Government*, 335.

The scholar of liberty knows that important as systems and institutions, principles and bills of rights are, they still demand rational and moral beings, for which they are intended, like the revelation itself, which is for conscious man alone. *Everything in this world has its dangers*. In this lies the fearful responsibility of demagogues. "Take power, bear down limitation," is their call on the people, as it was the call of the courtiers on Louis XIV. Their advice of political intemperance resembles that which is given on the tomb of Sardanapalus, regarding bodily intemperance: "Eat, drink and lust; the rest is nothing."

We must the more energetically cling to our institutional government, and the more attentively avoid extremes. At the same time, the question is fair whether other systems avoid the danger or do not substitute greater evils for it; and, lastly, we must in this, as in all other cases, while honestly endeavoring to remedy or prevent evil, have an eye to the whole and see which yields the fairest results. Nothing, moreover, is far more dangerous than to take single brilliant facts as representatives of systems. They prove general soundness as little brilliant deeds necessarily prove general morality.

It is these dangers that give so great a value to constitutions, if conceived in the spirit of liberty. The office of a good constitution, beside that of pronouncing and guaranteeing the rights of the citizen, is that, as a fundamental law of the state, it so defines and limits the chief powers, that, each moving in its own orb, without jostling the others, it prevents jarring and grants harmonious protection to all the minor powers of the state. *Lieber's Civil Liberty and Self-Government*, 338-9.

We find, among the characteristic distinctions between modern history and ancient, the longevity of modern states contemporaneous progress of wealth or culture and civil liberty, and the national state as contradistinguished from the ancient city-state, the only state of antiquity in which liberty existed. These are not merely facts which happen to present themselves to the historian, but they are conditions upon which it is the modern problem to develop liberty, because they are requisites for modern civilization, and civilization is the comprehensive aim of all humanity. *Lieber's Civil Liberty and Self-Government*, 360.

These differences between antiquity and modern times, all of which are more or less connected with Christianity and the institution, are:



1. That in antiquity only one nation flourished at a time. The course of history, therefore, flows in a narrow channel, and the historian can easily arrange universal ancient history. In modern periods, many nations flourish at the same time, and their history resembles the broad Atlantic, on which they all freely meet.

2. Ancient states are short-lived; modern states have a greater tenacity of life.

3. Ancient states, when once declining, were irretrievably lost. Their history is that of rising curve, with its maximum and declension. Modern states have frequently shown a recuperative power. Compare present England with that of Charles II, France as it is with the times of Louis XV.

4. Ancient liberty and wealth were incompatible, at least for any length of time; modern nations may grow freer while they are growing wealthy.

5. Ancient liberty dwelt in city-states only; modern liberty requires enlarged societies—nations.

6. Ancient liberty demanded disregard of individual liberty; modern liberty is founded upon it.

7. The ancients had no international law. (Nor have the Asiatics now. The incipency of international law is, indeed, visible with all tribes, for they are men. The Romans sent heralds to declare war, and the Greek, advised to poison his arrows, declines doing so, "for," Homer makes him say, "I fear the gods will punish me".) *Lieber's Civil Liberty and Self-Government*, 360, note.

Our destinies differ from that of brief and brilliant Greece. Let us derive all the benefit from Grecian culture and civilization—from that chosen nation, whose intellectuality and aesthetics, with Christian morality, Roman legality, and Teutonic individuality and independence, from the main elements of the great phenomenon we designate by the term modern civilization, without adopting her evils and errors, even as we adopt her sculpture without that religion whose very errors contributed to produce it. *Lieber's Civil Liberty and Self-Government*, 362.

### The Trophies and Triumphs of American Government

Hon. John Randolph Tucker, in an address to the American Bar Association, thus beautifully describes the achievements of the American Republic and Constitutional Government:

The night of the middle ages was far spent. The day of modern history was at dawn.

In one century after America was discovered, the reformation had shattered the veneration, with which the human mind viewed the claims of traditional faith. Right or wrong, it was rebellion against all kinds of tyranny over the minds of men. For when the most venerable institution in Europe was called in question, and its claim rejected, what other existing institution of philosophy or government could claim immunity from the challenge of free thought and unshackled speculation?

Just one hundred and fifteen years after America was found, a band of brave and sturdy colonists laid the corner-stone of the old Dominion, and planted the seeds of our peculiar civilization on the banks of our Virginia Nile. The other celebrated planting of the Pilgrims at Plymouth Rock came in 1620. These infant types of our polity have left their impress everywhere; and "this gem of the prairie, this pearl of the lake," is a child of the old Virginia, whose ragged soldiers from her Shenandoah Valley under General George Rogers Clark, the young Hannibal of the West, won by toilsome march and heroic battle in 1779 this great domain, which she freely shared with her confederate sisters.

What a change since then! What has our Anglo-American race done? Nay, what has it *not* done for liberty and law?

Give me pardon for taking a few moments, to group its trophies and recall its triumphs!

1. It has proclaimed, that sovereignty is an Essence, an inalienable and indivisible attribute, resident in and belonging only to the Body Politic; which is the aggregation of all the human beings composing it, organized by jural consent, express or implied, for the purposes of social life and for united co-operation for the peace and order of society, and for the security of each member in life, liberty, and the pursuit of happiness.

2. It has established from this essential Sovereignty of the people there are emanations of its will, expressed in a written Constitution or otherwise, by which sovereign powers are delegated to one or more governments and to the several departments thereof; that the people, as the Sovereignty, have original powers, which governments may only exercise by delegation; and that all acts or authority of governments, or any department thereof, not consistent with the Constitution, are wholly null and void. "

3. It has vested in the judiciary the paramount function of deciding, whether any act or authority of government or of any department there is or is not consistent with the Constitution, and upon a negative decision, to adjudge the same to be null and void, and by judicial process to make it of no effect.

4. It has made the feudal tenure of land, allodial ownership; has stricken off shackles from the alienation of land, and destroyed the perpetuity of entails, as a badge of caste in the ownership of property; it has made succession a legal conclusion, based on the natural affections of man, and not on the right of his feudal master; it has thus discarded primogeniture, all distinctions of sex and made equality of law, for succession, because it is the instinct of human love.

5. It has given equality of right to each human unit to use his faculties, which are of Divine gift, for the defense of his life and liberty and for the promotion of his happiness; denying to every one any special privilege, and imposing on no one a burden, not borne equally by all. The personal energy of each, in the use of his God-given powers, must be neither fostered nor foiled by a pretended paternalism, which spoils whom it pets, and discards only whom it would injure or destroy.

6. It has exorcised Caste; regulated domestic relations so as to conserve right rather than uphold traditional authority; and has opened the avenues to the temples of knowledge for all classes and races.

7. It has declared, in the memorable words of the act for religious freedom drawn by Jefferson, and passed by Virginia, December 16th, 1785, "that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities;" golden words, which might well find place at the threshold of every public edifice, and on the doorposts of every home in this land.

8. It has enlarged the jurisdiction of right, and of remedy for wrongs, by making judicial procedure more simple, its pleadings more candid and explicit, and by wedding and not divorcing in any one procedure the principles, legal and equitable, applicable to the subject of litigation.

9. It has made the judicial relations between nations, not a conflict for the aggrandizement of wealth or of power, but an arena for the decision of the right and for the prevention of wrong. And our own country, with the support and influence of the legal profession, and notably of my venerable predecessor, David Dudley Field, has done much to bring all questions of contest between nations to the award of reason, through the arbitrament of international jurists, rather than to the bloody assize of war, where brute force too often tramples on right, and wrong may be declared victor in the ordeal of battle, because supported by the heaviest battalions.

10. Finally, it has ordained a Federative System of Government, a Republic of Republics, in which power is wedded to Right, by leaving to each localism the exclusive power to control its local right, and by giving to the Common Government of all, the combined power of all, to regulate and direct the common defense and general welfare of all; and thus has furnished to mankind a model Constitutional Organism, wherein Government is potential for a People's defense, happiness and progressive Civilization, and yet impotent to destroy their freedom; where Government has the minimum of Power, and man the maximum of Liberty, consistent with the order, peace and safety of the People. *John Randolph Tucker, in Report of American Bar Association, Vol. 16, 208-9-10-11.*

### American Government Republican in Form

Mr. Madison said on this subject:

The first question that offers itself is, whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.

What, then, are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers, to the constitution of different States, no satisfactory one would ever be found. Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the people is exercised, in the most absolute manner, by a small body of hereditary nobles. Poland, which is a mixture of aristocracy and of monarchy in their worst forms, has been dignified with the same appellation. The government of England, which has one republican branch only, combined with an hereditary aristocracy and monarchy, has, with equal impropriety, been frequently placed on the list of republics. These examples, which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions. *Madison in The Federalist, Vol. I, Number XXXIX.*

### **The Government of the United States of America Distinguished From Other Governments**

It is a government of laws and not of men. Other governments are of men and not of laws. It exists, is chartered and limited by a written constitution. Other governments make and limit their unwritten constitutions. Its rights and powers are prescribed and limited by the people through a written constitution. Other governments confer and limit through unwritten constitutions all the rights and powers which the people possess. It possesses and can exercise only such rights and powers which the people have conferred on it. Other governments possess and exercise all rights and powers except those which they have conferred on the people. It guarantees to protect every citizen in the enjoyment of all his rights, privileges and immunities, both against the aggressions of the government itself and against those of other citizens. No other government guarantees any such protection to its citizens.

Its officers from the president, lawmakers and judges down to the lowest are agents of the government and servants of the people. The officers of other governments are the governments themselves and rulers of the people. In it no officer, high or low, is above the law; they are all amenable to the law. In other governments, the will of certain of its officers is the only law and they are not amenable, of course, to themselves; but the subjects are amenable to the so-called law. Its power is partitioned, and each part acts as a check upon, or



balance against, another part, and thus provides against monarchy, oligarchy and centralization. It guarantees protection to each citizen against the aggression of any or all the other citizens, and thus provides against anarchy. Other governments consolidate all power into one man or body of men, and thus oppress all others, and guarantee no one except the rulers against the aggressions either of the government or the other people; and hence rebellion or anarchy or both, are thus encouraged,—if not necessitated,—to obtain a new deal of rulers who are to soon be oppressive and tyrannical.

Its fundamental principles are modeled after the laws of nature, first announced by Sir Isaac Newton. Each part is acted upon by centripetal and centrifugal forces which cause each part to move in its own respective orbit, and never to collide with any other part. If other governments were modeled after any law of nature, they were those announced by Darwin, the survival of the fittest: that might makes right. (It should be said however, that most of these governments were modeled before Darwin was born.)

It is in its structure partly local-self, partly federal, partly national and partly international. The local self-government is left or reserved to the several states, counties, parishes, cities, towns and other districts. Its federal and national government is delegated to the president, congress and judicial departments of the Federal Government by the Constitution. The international, that is the treaty-making power, is delegated to the president and the senate. The structure is such that each of these parts may act independently of the other, and yet each checks and balances the other.

No other government is so constructed. In them all power to regulate each of these parts or partitions of government is either centered in one man or body of men, who parcel out the power or men who are to control all. No part can act independent of the other, and no one has any check or balance against another.

In it minorities have representation by and through the judicial department. It is the function of this department to see that each and every man has and enjoys his rights, privileges and immunities under the Constitution and the law as against the government itself and the majorities. No other government so protects the minorities against the government itself or the majorities.

Paradoxical as it may seem or sound, it is both the youngest and oldest of the really great governments of the world.

Its wonderful capacity to aid in the development of a new country; in the accumulation and diffusion of wealth; in the equality of the rights and liberties of the citizen; in its ability to defend itself and its citizens against aggressions, foreign or domestic; in its ability to do good for the whole world, in having its principles of liberty and justice diffused and developed in the old and new world, has been the wonder and astonishment of the people of other governments, and the pride and glory of its own. It has no parallel among the nations of the world in the development and security of personal liberty and freedom or of wealth or property and the diffusion thereof among its people. It was once the borrower of most all of the old European nations: it is now the large creditor of most all. If its example is to be worth much to the old world, it will be due to the recognition of the facts which distinguish it from other governments.

There are two features of Government, which distinguish our Government from all other Republican forms of Government: They are best stated in the *Federalist*, No. 51, as follows:

First. In a single republic all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound Republic of America; the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil; the one by creating a will in the community independent of the majority—that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This at best is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major as the rightful interests of the minor party, and may possibly be turned

against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. (*The Federalist*, No. 11.) *Foster on the Constitution*, (note) p. 278.

### **Dual Form of United States Government**

The Supreme Court, in construing the White Slave Law, said:

Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions, and surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of foods and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls.

This is the aim of the law expressed in broad generalization; and motives are made of determining consequence. Motives executed by actions may make it the concern of Government to exert its powers. Right purpose and fair trading need no restrictive regulation, but let them be transgressed and penalties and prohibitions must be applied. 227 U. S., 322.

### **Nature of United States Government Dual or Compound**

The two governments, State and National, each exercise their functions side by side, with a far more extensive range of action in the former than in the latter; but when they do come into conflict the former has to yield. It is still true in substance, as said by Jefferson, that they constitute "co-ordinate departments of one single and integral whole;" the former having the power of legislation and administration in affairs which concern their own citizens alone, the latter over whatever concerns foreigners or citizens of other States. And the usual simile is that of the solar system, with a comparison of the United States to the sun and of the States to the planets, each moving in its respective orbit, a deviation from which by any, if unchecked, would bring destruction upon the whole.

Within the sphere of the powers vested in them, the United States are supreme. Every State law or official action in conflict with an act passed in execution of a power of the United States is void. *Foster on the Constitution*, Vol. 1, pp. 271-2.

### **American Form of Government**

"What do you think of our institutions?" is the question addressed to the European traveller in the United States by every chance acquaintance. The traveller finds the question natural, for if he be an

observant man his own mind is full of these institutions. But he asks himself why it should be in America only that he is so interrogated. In England one does not inquire from foreigners, nor from even Americans their views on the English laws and government; nor does the Englishman on the Continent find Frenchmen and Italians anxious to have their judgment on their politics. Presently the reason of the difference appears. The institutions of the United States are deemed by inhabitants and admitted by strangers to be a matter of more general interest than those of the not less famous nations of the Old World. They are, or are supposed to be, institutions of a new type. They form, or are supposed to form, a symmetrical whole, capable of being studied and judged all together more profitably than the less perfectly harmonized institutions of older countries. They represent an experiment in the rule of the multitude, tried on the scale unprecedentedly vast, and the results of which every one is concerned to watch. And yet they are something more than an experiment, for they are believed to disclose and display the type of institutions towards which, as by a law of fate, the rest of civilized mankind are forced to move, some with swifter, other with slower, but all with unresting feet. *Bryce's American Commonwealth, Vol. I, 1.*

There are three main things that one wishes to know about a national commonwealth, viz, its framework, and constitutional machinery, the methods by which it is worked, the forces which move it and direct its course. *Bryce's American Commonwealth, Vol. I, 5.*

America is a Commonwealth of commonwealths, a Republic of republics, a State which, while one, is nevertheless composed of other States, even more essential to its existence than it is to theirs. *Bryce's American Commonwealth, Vol. I, 12.*

The American States are now all inside the Union, and have become subordinate to it. Yet the Union is more than an aggregate of States, and the States are more than parts of the Union. It might be destroyed, and they, adding a few further attributes of power to those they now possess, might survive as independent self-governing communities.

This is the cause of that immense complexity which startles and at first bewilders the student of American constitutions, a complexity which makes American history and current American politics so difficult to the European who finds in them phenomena to which his own experience supplies no parallel. *Bryce's American Commonwealth, Vol. I, 14.*

### **Sovereign Powers of the United States Government**

Mr. David Dudley Field, in an address prepared at the request of the World's Congress of Jurisprudence, and published in the *American Law Review*, XXVII, p. 641, said:

We began with asserting the sovereignty of the people. This was done by the Declaration of Independence in 1776. . . . In our country this supreme power is divided between the Union and the



States, but so much of it as has been given to the former by the latter. The result is, that Congress is not sovereign, nor is the President sovereign, nor is the Judiciary sovereign; nor, indeed, are all three combined sovereign. They may exercise their part of the sovereign power, but it is only by delegation that they exercise it at all. On the other hand, the reserved powers are all with the separate States (or the people thereof), so that we have in fact a divided sovereignty, but none the less is it true, that sovereignty in this country resides with the people, partly in all the States united, and partly in the several States—"E pluribus unum." See Dillon's Lectures. *The Laws and Jurisprudence of England and America*, 352. footnote.

Mr. Dillon, in commenting on this, says:

The United States have placed their constitution beyond the reach of executive and legislative power. The President may act and the Congress may act, but the judiciary may decide after all, whether the act is authorized by the constitution. Never before in any constitutional government was the organic law put under the guardianship of the judiciary. This is a feature purely American, and of value incalculable for the protection of individual rights. . . .

"In the category of these individual rights I conceive that the greatest achievement ever made in the cause of human progress is the total and final separation of the State from the Church. If we had nothing else to boast of, we could claim with justice that first among the nations we of this country made it an article of organic law that the relations between man and his maker were a private concern into which other men had no right to intrude. . . . Besides this great act of deliverance, we have emancipated woman from the domination of her husband; we have freed the honest debtor from the possibility of passing his life in prison; we have rendered it impossible for legislation to make that act a crime which was not a crime when it was committed; we have forbidden the States to impair the obligation of a contract between man and man; we have proclaimed from sea to sea that all men are created equal in rights, and that among these rights are the rights of life, liberty, and the pursuit of happiness; we have imbedded in the fundamental law of the land as principles inviolable and eternal, that no man can be deprived of these rights without due process of law, and that all are entitled to the equal protection of the laws." *The Laws and Jurisprudence of England and America*, 353.

Contrast these rights and liberties under our laws with those of other countries. Judge Dillon thus compares them with others in the early days of our Constitutional Government:

In many of the countries of the Old World the landless poor are the natural enemies of the government. Here, every proprietor, however small, is the natural ally of government and of law. There may be some reason for the various forms of socialism, communism, anarchism, among the oppressed peoples of the Old World. They are the unreasoning and desperate remedies of caste, and hunger, and despair.

But here, and among us, such ideas are baneful exotics, which have taken deep root, and attract little notice except when their wild or bad adherents seek to propagate them by illegal violence or murder.

Sydney Smith drew this graphic picture of the condition of the English laws, on the enumerated subjects, in 1803,—that is, about fifteen years after our government was established: "The Catholics were not emancipated. The Corporation and Test Acts were repealed. The game laws were horribly oppressive. For every ten pheasants which fluttered in the wood, one English peasant was rotting in jail. Steel traps and spring guns were set all over the country; prisoners tried for their lives could not have counsel. Lord Eldon and the Court of Chancery pressed heavily on mankind. Libel was punished by the most cruel and vindictive imprisonments. The laws of debt and conspiracy were little understood. Not a murmur against any abuse was permitted; to say a word against the sutoricide delays of the Court of Chancery, or the cruel punishments of the game laws, or any abuse which a rich man inflicted and a poor man suffered was treason against the *plousiocracy*, and was bitterly and steadily resented." Again he said: "The abuses of the Court of Chancery have been the curse of England for centuries. For twenty-five years did Lord Eldon sit in the court surrounded by misery and sorrow, which he never held up a finger to alleviate. The widow and orphan cried to him as vainly as the town-crier cries when he offers a small reward for a full purse; the bankrupt of the court became the lunatic of the court; estates mouldered away and mansions fell down, but the fees came in and all was well. But in an instant (in 1832) the iron mace of Brougham shivered to atoms this house of fraud and delay." If this picture is too highly colored, its essential features are correct; but we are glad to know that in all of these respects the English law has greatly improved, mostly within the last sixty years. *The Laws and Jurisprudence of England and America, Lectures of Judge Dillon, 357-8.*

### Colonial Origin of the United States Government

Mr. Calhoun thus states the history of its origin:

It is known to all, in any degree familiar with our history, that the region embraced by the original States of the Union appertained to the crown of Great Britain, at the time of its colonization; and that different portions of it were granted to certain companies or individuals, for the purpose of settlement and colonization. It is also known, that the thirteen colonies, which afterwards declared their independence, were established under charters which, while they left the sovereignty in the crown, and reserved the general power of supervision to the parent country, secured to the several colonies popular representation in their respective governments, or in one branch, at least, of their legislatures,—with the general rights of British subjects. Although the colonies had no political connection with each other, except as dependent provinces of the same crown—they were closely bound together by the ties of a common origin, identity of language, similarity of religion, laws, customs, manners,

commercial and social intercourse,—and by a sense of common danger,—exposed, as they were, to the incursions of a savage foe, acting under the influence of a powerful and hostile nation.

In this embryo state of our political existence, are to be found all the elements which subsequently led to the formation of our peculiar system of governments. The revolution, as it is called, produced no other changes than those which were necessarily caused by the declaration of independence. These were, indeed, very important. Its first and necessary effect was, to cut the cord which had bound the colonies to the parent country,—to extinguish all the authority of the latter,—and, by consequence, to convert them into thirteen independent and sovereign States. *1 Calhoun's Works, pp. 188-9.*

They, in the course of a few years, by entering into articles of confederation and perpetual union, established and made more perfect the union which had been informally constituted, in consequence of the exigencies growing out of the contest with a powerful enemy. But experience soon proved that the confederacy was wholly inadequate to effect the objects for which it was formed. It was then, and not until then, that the causes which had their origin in our embryo state, and which had, thus far, led to such happy results, fully developed themselves. The failure of the confederacy was so glaring, as to make it appear to all, that something must be done to meet the exigencies of the occasion:—and the great question which presented itself to all was:—what should, or could be done?

To dissolve the Union was too abhorrent to be named. In addition to the causes which had connected them by such strong cords of affection while colonies, there were superadded others, still more powerful,—resulting from the common dangers to which they had been exposed, and the common glory they had acquired, in passing successfully through the war of the revolution. Besides, all saw that the hope of reaping the rich rewards of their successful resistance to the encroachment of the parent country, depended on preserving the Union.

But, if disunion was out of the question, consolidation was not less repugnant to their feelings and opinions. *1 Calhoun's Works, pp. 192-3.*

### The United States Government—How Ordained

In 1 Wheat. 304, 324-31, Judge Story said that “the Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by the people of the United States.”

In 4 Wheat. 316, 403, Judge Marshall said: “The government proceeds directly from the people; is ‘ordained and established’ in the name of the people; and is declared to be ordained, ‘in order to form a more perfect union, establish justice, ensure domestic tranquillity, and secure the blessings of liberty to themselves and their posterity.’ The assent of the states, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be

negated, by the state governments. The Constitution, when thus adopted, was of complete obligation, and bound the state sovereignties. . . . The government of the Union, then, is, emphatically, and truly, a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit. This Government is acknowledged by all to be one of enumerated powers. . . . It is the Government of all; its powers are delegated by all; it represents all, and acts for all."

Although the states are constituent parts of the United States, the Government rests upon the authority of the people of the United States, and not on that of the states. Judge Marshall in 6 Wheat. 264, 413, said: "That the United States form for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects and to many purposes, a nation; and for these purposes her government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for those objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory."

In reference to the doctrine that the Constitution was established by and for the states as distinct political organizations, Mr. Webster said: "The Constitution itself in its very front refutes that. It declares that it is ordained and established by the People of the United States. So far from saying that it is established by the governments of the several states, it does not even say that it is established by the people of the several states. But it pronounces that it was established by the people of the United States in the aggregate. Doubtless, the people of the several states, taken collectively, constitute the people of the United States. But it is in this their collective capacity, it is as all the people of the United States, that they established the Constitution." *182 U. S. 376-8.*

### **Ancient Governments—By Whom Established or Created**

Mr. Madison said of early governments:

It is not a little remarkable that in every case reported by ancient history, in which government has been established with deliberation and consent, the task of framing it has not been committed to an assembly of men, but has been performed by some individual citizen of pre-eminent wisdom and approved integrity.

Minos, we learn, was the primitive founder of the government of the Crete, as Zaleucus was of that of the Locrians, Theseus first, and after him Draco and Solon, instituted the government of Athens. Lycurgus was the lawgiver of Sparta. The foundation of the original



government of Rome was laid by Romulus, and the work completed by two of his elective successors, Numa and Tullius Hostilius. *Madison in The Federalist, Number XXXVIII.*

History informs us, likewise, of the difficulties with which these celebrated reformers had to contend, as well as the expedients which they were obliged to employ in order to carry their reforms into effect. Solon, who seems to have indulged a more temporizing policy, confessed that he had not given to his countrymen the government best suited to their happiness, but most tolerable to their prejudices. And Lycurgus, more true to his object, was under the necessity of mixing a portion of violence with the authority of superstition, and of securing his final success by a voluntary renunciation, first of his country, and then of his life. *Madison in The Federalist, Number XXXVIII.*

### Government of the United States a Federal Government

Mr. Black thus describes the Government:

The American Union is commonly described as a federal government. And political writers and jurists usually speak of the federal constitution, the federal courts and jurisdiction, federal powers, the federal executive, etc. The use of this term is not made imperative by anything in the constitution. The nature of the government is not described therein. Nor can its employment settle anything as to the nature or powers of the government. But the term expresses the common understanding as to the kind of government prevailing in our country. And it is a correct designation, technically, if taken in its true sense. There is, in political science, a substantial difference between a confederation and a federal government. *Black on Constitutional Laws, 27.*

The United States is a federal republic. So also each of the states is a republic, and the constitution guarantees to each the continuance of republic government. The exact meaning of the phrase will be more fully considered in another place. At present it is sufficient to say that a republic, as distinguished from a despotism, a monarchy, or an oligarchy, is a government wherein the political power is confined to and exercised by the people. It is a government "of the people, by the people, and for the people." It implies a practically unrestricted suffrage, and the frequent interposition of the people, by means of the suffrage, in the public affairs. *Black on Constitutional Laws, 28.*

### The United States Government—Is It Federal Or National?

In 1827, Mr. Madison wrote Dr. Cooper as follows:

The mail has furnished me with a copy of your Lectures on Civil Government and on the Constitution of the United States. I find in them much in which to concur; parts on which I might say *non liquet*; and others from which I should dissent; but in none of which interesting views are not presented. What alone I mean to notice, is a passage in which you have been misled by the authorities before

you, and by a misunderstanding of the term "national," used in the early proceedings of the convention of 1787. Both Mr. Yates and Mr. Martin brought to the convention predispositions against its object: the one from Maryland representing the party of Mr. Chase, opposed to Federal restraints on the State legislation; the other from New York, the party unwilling to lose the power over trade, through which the State levied a tribute on the consumption of its neighbors. Both of them left the convention long before it completed its work; and appear to have reported in angry terms what they had observed with jaundiced eyes. Mr. Martin is said to have recanted at a later day, and Mr. Yates to have changed his politics, and joined the party adverse to that which sent him to the convention.

With respect to the term "national," as contradistinguished from the term "federal," it was not meant to express the *extent* of power, but the *mode of its operation*, which was to be, not like the power of the old confederation, operating on *States*, but like that of ordinary governments, operating on individuals; and the substitution of "United States" for "national," noted in the journal, was not designed to change the meaning of the latter, but to guard against a mistake or misrepresentation of what was intended. The term "national" was used in the original propositions offered on the part of the Virginia deputies, not one of whom attached to it any other meaning than that here explained. Mr. Randolph himself, the organ of the deputation on the occasion, was a strenuous advocate for the federal quality of limited and specified powers; and finally refused to sign the Constitution because its powers were not sufficiently limited and defined. *3 Writings of Madison, p. 546.*

This is a much disputed question, and one upon which the greatest statesmen and constitutional lawyers disagree.

Mr. Story and his school claim it to be national. Mr. Jefferson and his school claim it to be Federal only. The truth lies between the two extremes; both are right, and both are wrong. It is both a paradox and a truth to say that it is neither national nor federal; it is both national and federal. It is partly both, and wholly neither, in the sense contended for by the extremist on either side. Mr. Madison, who was neither a Republican nor a Federalist, and who was both a Republican and a Federalist, and who above all others had most to do in framing and moulding the union, is used as authority by both extremes. He says it cannot be national in the sense contended for, because it is conceded that it does not and never did possess all of the powers necessary to a complete national government; that its jurisdiction extends only to a few enumerated and implied powers, the residuary powers remaining in the states. It requires both the states and the Union to constitute a complete government. The states did and could exist without the Union, but the Union could not

exist without the states. The states, so far as the states governments are concerned, are independent, each of the other; but so far as the Union is concerned, they are not independent, but dependent because they have granted a part of their powers to a common grantee, and have agreed as states or grantors, not to exercise certain powers; but that those powers should be exercised by the common grantee or its agents, and the real sovereigns, the body politic of the several states have consented and agreed that all such powers should be granted, and after they were so granted by the states, the deeds and grants were ratified by the people.

Mr. Madison's views have been generally accepted; that it is not wholly either, that it is partly both. Federalist Nos. 34 and 40. Mr. Calhoun claimed that this could not be. That it was contrary to the nature of things. He, of course, believed it to be wholly Federal, and gives his proofs thereof. See 1 Calhoun's Works, p. 151, et seq. It is singular that both Mr. Madison and Mr. Calhoun rely on the same provisions of the Constitution to establish their respective theories.

The same causes which have tended to the creation of national public opinion with definite characteristics have tended to make it comprehend more subjects, and tends to make it look to the federal government as a means for accomplishing its purposes. This was not apparent during the war and the period of reconstruction. It had commenced before the war. It is the natural and inevitable drift of things. It was greatly stimulated by the success of the movement for the abolition of slavery. People are more and more disposed to look to the national government. We have in the United States now reformers who wish to improve the condition of the farmer, to elevate and ameliorate the condition of labor; who wish to regulate transportation and restrain monopolies; persons who wish to protect lands from overflow by an extensive system of levees, and who desire improved health regulations; educational reformers, temperance reformers, and socialists. There is nothing whatever in the Constitution to warrant the national government interfering in many of these matters; and yet all of these persons show more and more disposition to look to the general government as the agent for the accomplishment of their purpose. *Richard M. Venable, in Reports of American Bar Association, Vol. 8, 258-9.*

There is a strong tendency to convert the Constitution into a code, or book of ordinances. There are now many reformers, who believe that the Constitution should no longer be a grant by the States or the people thereof to the United States, and limitations upon the powers of both the States and United States, but that it should be made up of statutes and ordinances prescribing a course of conduct for the people telling

them what they must do and what they must not do, telling them what they shall and shall not eat, drink, and wear, and who shall vote and who shall not vote.

The convention which framed it was divided, as has been stated, into two parties: one in favor of a *national*, and the other of a *federal* government. The former, consisting, for the most part, of the younger and more talented members of the body,—but of the less experienced,—prevailed in the early stages of its proceedings. A negative on the action of the governments of the several States, in some form or other, without a corresponding one, on their part, on the acts of the government about to be formed, was indispensable to the consummation of their plan. They, accordingly, as has been shown, attempted, at every stage of the proceedings of the convention, and in all possible forms, to insert some provision in the constitution, which would in effect, vest it with a negative; but failed in all. The party in favor of a *federal* form, subsequently acquiesced, but without surrendering their preference for their own favorite plan; or yielding, entirely, their confidence in the plan adopted, or the necessity of a negative on the action of the separate governments of the States. They regarded the plan as but an experiment; and determined, as honest men and good patriots, to give it a fair trial. They even assumed the name of federalists. *1 Calhoun's Works, pp. 340-1.*

### Is the United States Government Federal, National or a League?

Before the adoption of the Constitution, the several States who were parties to the Confederation were independent and sovereign. This theory, although disputed by high authority, seems to be established. Prior to the outbreak of the Revolution, the colonies were separate, connected with each other only through their common dependence upon Great Britain, differing in the race of their inhabitants, the character of their occupations, and the nature of their religion. When the difficulties arose with Great Britain, at the outbreak of the Revolutionary War, they sent delegates to the Continental Congress, which superintended the conduct of the war, and which passed and promulgated the Declaration of Independence. *Foster on the Constitution, Vol. 1, p. 63.*

In the legislature of South Carolina, which recommended the State Convention of ratification, General Charles Cotesworth Pinckney, after quoting the Declaration of Independence, used these prophetic words:

“The separate independence and individual sovereignty of the several States were never thought of by the enlightened band of patriots who framed this Declaration; the several States are not even mentioned by name in any part of it, as if it was intended to impress this maxim on America, that our freedom and independence arose from our Union, and that without it we could be neither free nor independent. Let us, then, consider all attempts to weaken this Union, by maintaining that each State is separately and individually inde-



pendent, as a species of political heresy, which can never benefit us, but may bring on us the most serious distress." *Foster on the Constitution, Vol. 1, pp. 68-9.*

The United States are a nation. The Union is not a league, and cannot be dissolved except by a revolution. These are principles which have been established by the adjudications of the courts, the action of Congress and the executive, the acquiescence of the States, and the arbitrament of war. The question lies at the foundation of the government, and on it the people of the country were for three-quarters of a century divided. Now that a generation is in power which accepts the decision, whether sound or erroneous, as final, the arguments on either side deserve a dispassionate consideration. *Foster on the Constitution, Vol. 1 p. 61.*

If the Constitution is a league, it is no longer binding upon any one of the States which has determined to withdraw from it. The citizens of that State must, it is said, obey the will of the State in that respect, and in waging war under the State banner against the United States, they are not guilty of treason. The advocates of the prevailing view have denied that the States were sovereign before the adoption of the Constitution. They have denied that the States formed the Constitution, insisting that its preamble shows that it was adopted, not by the States, but by the people of the country at large, whose votes were taken in the States of their respective residence for convenience, without any legal signification. Even if the Constitution was formed by some of the States, they had the power to so merge themselves together in one nation as to make subsequent separation illegal. The proceedings of the Federal Convention, it is claimed, show that it was the intention of its members to establish a national form of government, and not a league. *Foster on the Constitution, Vol. 1, p. 62.*

### **Is the American Government Federal, National or Republic?**

Mr. Madison said of our Government in this respect:

It is to be the assent and ratification of the several States, derived from the supreme authority in each State,—the authority of the people themselves. The act, however, establishing the Constitution, will not be a NATIONAL, but a FEDERAL act.

That it will be a federal and not a national act, as these terms are understood by the objectors; the act of the people, as forming so many independent States, not as forming one aggregate nation, is obvious from this single consideration, that it is to result neither from the decision of a MAJORITY of the people of the Union, nor from that of a MAJORITY of the States. It must result from the UNANIMOUS assent of the several States that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority, in the same manner as the majority in each State must bind the minority; and the will of the majority must be deter-

mined either by a comparison of the individual votes, or by considering the will of the majority of the States as evidence of the will of a majority of the people of the United States. Neither of these rules have been adopted. Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a FEDERAL, and not a NATIONAL constitution. *Madison in The Federalist, Vol. I, Number XXXIX.*

The Executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society. The eventual election, again, is to be made by that branch of the legislature which consists of the national representatives; but in this particular act they are to be thrown into the form of individual delegations, from so many distinct and coequal bodies politic. From this aspect of the government it appears to be of a mixed character, presenting at least as many FEDERAL as NATIONAL features.

The difference between a federal and national government, as it relates to the OPERATION OF THE GOVERNMENT, is supposed to consist in this, that in the former the powers operate on the political bodies composing the Confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities. On trying the Constitution by this criterion, it falls under the NATIONAL, not the FEDERAL character; though perhaps not so completely as has been understood. *Madison in The Federalist, Vol. I, Number XXXIX.*

If we try the Constitution by its last relation to the authority by which amendments are to be made, we find it neither wholly NATIONAL nor wholly FEDERAL. Were it wholly national, the supreme and ultimate authority would reside in the MAJORITY of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly federal, on the other hand, the concurrence of each State in the Union would be binding on all. The mode provided by the plan of the convention is not founded on either of these principles. In requiring more than a majority, and particularly in computing the proportion by States, not by CITIZENS, it departs from the NATIONAL and advances towards the FEDERAL character; in rendering the concurrence of less than the whole number of States sufficient, it loses again the FEDERAL and partakes of the NATIONAL character.

The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national. *Madison in The Federalist, Vol. I, Number XXXIX.*

It appears, 1st, that the object of the convention was to establish, in these States, A FIRM NATIONAL GOVERNMENT; 2d,\* that this government was to be such as would be ADEQUATE TO THE EXIGENCIES OF GOVERNMENT and THE PRESERVATION OF THE UNION; 3d, that these purposes were to be effected by ALTERATIONS AND PROVISIONS IN THE ARTICLES OF CONFEDERATION as it is expressed in the act of Congress, or by SUCH FURTHER PROVISIONS AS SHOULD APPEAR NECESSARY, as it stands in the recommendatory act from Annapolis; 4th, that the alterations and provisions were to be reported to Congress, and to the States, in order to be agreed to by the former and confirmed by the latter.

From a comparison and fair construction of these several modes of expression, is to be deduced the authority under which the convention acted. They were to frame a NATIONAL GOVERNMENT, adequate to the EXIGENCIES OF GOVERNMENT, and OF THE UNION; and to reduce the articles of Confederation into such form as to accomplish these purposes. *Madison in The Federalist, Vol. I, Number XL.*

### **The United States Government Not a Republic Nor a Democracy**

Mr. Calhoun thus states the case:

It is not an uncommon impression, that the government of the United States is a government based simply on population; that numbers are its only element, and a numerical majority its only controlling power. In brief, that it is an absolute democracy. No opinion can be more erroneous. *1 Calhoun's Works, pp. 168-9.*

The government of the United States is a democratic federal Republic,—democratic in contradistinction to aristocratic, and monarchical,—federal, in contradistinction to national, on the one hand,—and to a confederacy, on the other; and a Republic—a government of the concurrent majority, in contradistinction to an absolute democracy—or a government of the numerical majority.

But the government of the United States, with all its complications and refinement of organization, is but a part of a system of governments. It is the representative and organ of the States, only to the extent of the powers delegated to it. Beyond this, each State has its own separate government, which is its exclusive representative and organ, as to all the other powers of government,—or, as they are usually called, the reserved powers. *1 Calhoun's Works, p. 187.*

### **Powers Conferred On the United States Government**

Mr. Madison thus formulates them:

1. Security against foreign danger.
2. Regulation of the intercourse with foreign nations.
3. Maintenance of harmony and proper intercourse among the States.
4. Certain miscellaneous objects of general utility.
5. Restraint of the States from certain injurious acts.
6. Provisions for giving due efficacy to all these powers.

The powers falling within FIRST class are those of declaring war and granting letters of marque; of providing armies and fleets; of regulating and calling forth the militia; of levying and borrowing money.

Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils.

Is the power of declaring war necessary? No man will answer this question in the negative. It would be superfluous, therefore, to enter into a proof of the affirmative. The existing Confederation establishes this power in the ample form. *Madison in The Federalist, Vol. I, Number XLI.*

### **United States Government a Government of Limited Powers**

The Supreme Court thus describes it:

The government of the United States is the government ordained by the Constitution, and possesses the powers conferred by the Constitution. "This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" 1 Cranch, 137, 176. The opinion of the court in that case was delivered in February, 1803, and at the October term, 1885, the court, in 118 U. S. 356, said: "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power."

From *Marbury v. Madison*, 1 Cranch, 137, to the present day, no utterance of this court has intimated a doubt that in its operation on the people, by whom and for whom it was established, the national government is a government of enumerated powers, the exercise of which is restricted to the use of means appropriate and plainly adapted to constitutional ends, and which are "not prohibited, but consist with the letter and spirit of the Constitution."

The powers delegated by the people to their agents are not enlarged by the expansion of the domain within which they are exercised. When the restriction on the exercise of a particular power by a particular agent is ascertained, that is an end of the question.



To hold otherwise is to overthrow the basis of our constitutional law, and moreover, in effect, to reassert the proposition that the states and not the people created the government.

It is again to antagonize Judge Marshall, when he said:

"The government of the Union, then, (whatever may be the influence of this fact on the case,) is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit. This government is acknowledged by all to be one of enumerated powers." 4 Wheat. 404. . . .

The underlying principle is indicated by Judge Taney, in 7 How. 283, 492, where he maintained the right of the American citizen to free transit in these words: "Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States, from the most remote states or territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every state and territory of the Union. . . . For all the great purposes for which the federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own states."

In 16 How. 164, 197, it was held that by the ratification of the treaty with Mexico "California became a part of the United States," and that: "The right claimed to land foreign goods within the United States at any place out of a collection district, if allowed, would be a violation of that provision in the Constitution which enjoins that all duties, imposts and excises shall be uniform throughout the United States."

In 19 How. 393, the court was unanimous in holding that the power to legislate respecting a territory was limited by the restrictions of the Constitution, or, as Judge Curtis put it, "by the express prohibitions on Congress not to do certain things."

Mr. Justice McLean said: "No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit."

Mr. Justice Campbell said: "I look in vain, among the discussions of the time, for the assertion of a supreme sovereignty for Congress over the territory then belonging to the United States, or that they might thereafter acquire. I seek in vain for an annunciation that a consolidated power had been inaugurated, whose subject comprehended an empire, and which had no restriction but the discretion of Congress."

Chief Justice Taney said: "The powers over persons and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the states, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under territorial government, as well as that covered by states. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a territory, so far as these

rights are concerned, on the same footing with citizens of the states, and guards them as firmly and plainly against any inroads which the general government might attempt, under the plea of implied or incidental powers." 182 U. S. 358-61.

### **Powers of United States Government in Controversies Between States**

In 1827 Mr. Madison wrote to Mr. Van Buren as follows:

If it be understood that our political system contains no provision for deciding questions between the Union and its members but that of negotiation, this failing, but that of war, as between separate and independent Powers, no time ought to be lost in supplying, by some mode or other, the awful omission. What has been called a Government is, on that supposition, a mere league only; a league with too many parties to be uniformly observed or effectively maintained.

You did well, I think, in postponing the attempt to amend the phraseology of the Constitution on a point essentially affecting its operative character. 3 *Writings of Madison*, p. 569.

### **Conflicts Between State and Federal Powers in the United States**

In 1808 the legislatures of some of the New England States passed resolutions condemning the embargo which the National government had laid upon shipping by an Act of that year. The State judges, emboldened by these resolutions, "took an attitude consistently hostile to the embargo," holding it to be unconstitutional; and the Federal courts of New England "seldom succeeded in finding juries which would convict even for the most flagrant violation of its provisions." In 1821 the governors of Massachusetts and Connecticut refused to allow the State militia to leave their State in pursuance to a requisition made by the President under the authority of an Act of Congress, alleging the requisition to be unconstitutional. In 1828-30 Georgia refused to obey an Act of Congress regarding the Cherokee Indians and to respect the treaties which the United States had made with this tribe and the Creeks. The Georgia legislature passed and enforced an Act in contempt of Federal authority, and disregarded the orders of the Supreme Court, President Jackson, who had an old frontiersman's hatred to the Indians, declining to interfere.

Finally, in 1822, South Carolina, first in a State convention and then by her legislature amplified while professing to repeat the claim of the Kentucky resolutions of 1789, declared the tariff imposed by Congress to be null and void as regards herself, and proceeded to prepare for secession and war. In none of these cases was the dispute fought out either in the courts or in the field; and the questions as to the right of a State to resist Federal authority, and as to the means whereby she could be coerced, were left over for future settlement. Settled they finally were by the Civil War of 1861-65, since which time the following doctrines may be deemed established:

No State has a right to declare an act of the Federal Government invalid.

No State has a right to secede from the Union.

The only authority competent to decide finally on the constitutionality of an act of Congress or of the national executive is the Federal judiciary. *Bryce's American Commonwealth, Vol. 1, 328-9.*

Except in the cases which have already been specified, the National government has no right whatever of interfering either with a State as a commonwealth or with the individual citizens thereof, and may be lawfully resisted should it attempt to do so.

"What then," the European reader may ask, "Is the National government without the duty of correcting the social and political evils which it may find to exist in a particular State, and which a vast majority of the nation may condemn? Suppose widespread brigandage to exist in one of the States, endangering life and property. Suppose contracts to be habitually broken, and no redress to be obtainable in the State courts. Suppose the police to be in league with the assassins. Suppose the most mischievous laws to be enacted, laws, for instance, which recognize polygamy, leave homicide unpunished, drive away capital by imposing upon it an intolerable load of taxation. Is the nation obliged to stand by with folded arms while it sees a meritorious minority oppressed, the prosperity of the State ruined, a pernicious example set to other States? Is it to be debarred from using its supreme authority to rectify these mischiefs?"

The answer is, Yes. Unless the legislature or administration of such State transgresses some provision of the Federal Constitution (such as that forbidding *ex post facto* laws, or laws impairing the obligation of a contract), the National government not only ought to interfere but can interfere. The State must go its own way, with whatever injury to private rights and common interests its folly or perversity may cause. *Bryce's American Commonwealth, Vol. I, 330-1.*

### Classification of Powers of Government in the United States

The powers of government are divided into three classes, to wit:

- (a) Legislative.
- (b) Executive.
- (c) Judicial.

#### SEPARATION OF GOVERNMENTAL POWERS

All American constitutions, state and federal, provide for the separation of the three powers of government and their appointment to distinct and independent departments of the government. *Black on Constitutional Law, 73.*

#### Powers of the Federal Government

The governmental powers relating to intercourse with foreign nations, such as commerce, treaties, wars and allegiances is by the constitution vested in the Federal government. Most

all governmental powers, which are international, or relate or pertain to international affairs, are vested in the Federal government.

### The Nature of Governmental Power

Mr. Hamilton says: "What is a power but the ability or faculty of doing a thing? What is the ability to do a thing but the power of employing the means necessary to its execution? What is a LEGISLATIVE power but a power to make laws? What is the power of laying and collecting taxes but a *legislative power*, or a power of *making laws* to lay and collect taxes? What are the proper means of executing such a power but necessary and proper laws?" *1 Tucker's Const. pp. 364-5.*

In *McCullough v. Md.*, 4 Wheaton, it is said:

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended; but we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. *1 Tucker's Const. p. 367.*

All means which are appropriate,—which are plainly adapted to that end,—which are not prohibited, but consist with the letter and spirit of the Constitution are constitutional. *1 Tucker's Const. p. 371.*

### Governmental Powers Reserved

The powers thus designated are divided into two distinct classes: those delegated by the people of the several States to their separate State governments, and those which they still retain, not having delegated them to either government. Among them is included the high sovereign power, by which they ordained and established both; and by which they can modify, change or abolish them at pleasure. This, with others not delegated, are those which are reserved to the people of the several States respectively.

There are powers exercised by most other Governments, which, in the United States, are withheld by the people, both from the General Government and from the State governments. Of this sort are many of the powers prohibited by the Declaration of Right prefixed to the constitutions, or by the clauses in the constitution in the nature of such declarations. Nay, so far is the political system of the United States distinguishable from that of other countries, by the caution with which powers are delegated and defined, that in one very important case, even of commercial regulation and revenue, the power is absolutely locked up against the hands of both Governments. A tax on exports can be laid by no constitutional authority whatever.



## Governmental Powers Granted and Reserved

Properly considered, the reserved and delegated powers can never come into conflict. The fact that a power is delegated, is conclusive that it is not reserved; and that, if not delegated, it is reserved, unless indeed it be prohibited to the States. There is but a single exception; the case of powers of such nature that they may be exercised concurrently by the State and General Government—such as the power of laying taxes, which, though delegated, may also be exercised by the State. 2 *Calhoun's Works*, p. 526.

## Governmental Powers Exclusive and Concurrent

Many of the powers of the general government are unquestionably supreme and exclusive, while others, especially those in relation to remedies afforded by its courts to private suitors, are only concurrent with similar powers possessed by the state governments. If the power in respect to parties competent to sue in the national and federal courts could be supposed to exist in its absolute sense in the United States government its exercise has been modified and restricted by congress in the 11th section of the act of Sept. 24, 1789, which gives to the circuit courts no more than a concurrent jurisdiction with the state courts, of suits of a civil nature, at common law. 2 Stat. 60.

Nor do all attributes of sovereignty devolve upon the national government. Whether considered as emanating directly from the people in their aggregate capacity, or as proceeding from the states, in their independent organization and character, the government of the Union is one of special powers, defined or necessarily implied in the terms of the grant. 4 Wheat. 407; 2 Story Const. 1907; 12 Pet. 657.

Though the point has been labored with ability by a late jurist of eminence in this department of legal learning, to deduce from the circumstances attendant upon the establishment of this government, that the common law became embodied in it, as an efficient principle of its authority and action, (Du Ponceau on Jurisdiction, 85) yet the doctrine has never been declared or sanctioned by our courts. So far as the decisions have gone, they tend to repudiate the principle *in toto*. 7 Cranch, 32; 1 Wheat. 415.

There is, accordingly, no sure foundation for the assumption that the federal government possesses common law prerogatives inherent in the sovereign, which can be exercised without authority of positive law. 1 Wheat. 304-29. 136 U. S. 605.

## Exclusive Powers of United States Government

The exclusive power of the federal government in relation to intercourse with foreign nations, potentates, and public authorities. This exclusive power is derived from its power of peace and war, its treaty-making power, its exclusive right to send and receive ambassadors and other public functionaries; and its intercourse in exercising this power is exclusively with governments and public authorities, and has no connection whatever with private persons, whether they be emigrants or passengers, or travellers by land or water from a

foreign country. This power over intercourse with foreign governments and authorities has frequently been spoken of, in opinions delivered in the Supreme Court, as an exclusive power. 7 How. 494.

This provision of the constitution, it is to be feared, is sometimes expounded without those qualifications which the character of the parties to that instrument, and its adaption to the purposes for which it was created, necessarily imply. Every power delegated to the federal government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, either in intention or in fact, ceded to the general government. Laws of the United States, in order to be binding, must be within the legislative powers vested by the constitution. Treaties, in order to be valid, must be made within the scope of the same powers; for there can be no authority of the United States, save what is derived immediately, and regularly and legitimately, from the constitution. A treaty no more than an ordinary statute can arbitrarily cede away any one right of a State, or of any citizen of a State. 5 How. 613. 7 How. 507.

### Mode of Executing Powers of United States Government

The powers of the government, as defined by the constitution and interpreted by the well-settled principles which have resulted from a century of wise and patriotic analysis, are supreme. These supreme powers extend to the protection of itself and all of its agencies, as well as to the preservation and the perpetuation of its usefulness; and these powers may be found not only in the express authorities conferred by the constitution, but also in necessary and proper implications. But while that is all true, it is also true that the powers must be exercised, not only by the organs, but also in conformity with the modes, prescribed by the constitution itself. These great federal powers, whose existence in all their plentitude and energy is incontestable, are not autocratic and lawless; they are organized powers, committed by the people to the hands of their servants for their own government, and distributed among the legislative, executive and judicial departments, they are not *extra* the constitution, for in and by that constitution, and it alone, the United States, as a great democratic federal republic, was called into existence, and finds its continued existence possible. 135 U. S. 82.

### Power of United States Government to Engage in Internal Improvements

In a recent decision of the Supreme Court it is said:

Article 2 of the treaty with Columbia (33 Stat. 2234) "grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said canal." By article 3. Panama "grants to the United States all the rights, power and authority within the zone mentioned and described in article 2 of this

agreement, . . . which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."

Other provisions of the treaty add to the grants named in these two articles further guaranties of exclusive rights of the United States in the construction and maintenance of this canal. It is hypercritical to contend that the title of the United States is imperfect, and that the territory described does not belong to this Nation, because of the omission of some of the technical terms used in ordinary conveyances of real estate.

Further, it is said that the boundaries of the zone are not described in the treaty; but the description is sufficient for identification, and it has been practically identified by the concurrent action of the two nations alone interested in the matter. The fact that there may possibly be in the future some dispute as to the exact boundary on either side is immaterial. Such disputes not infrequently attend conveyances of real estate or cessions of territory. Alaska was ceded to us forty years ago, but the boundary between it and the English possessions east was not settled until within the last two or three years. Yet no one ever doubted the title of this republic to Alaska.

Plaintiff contends that the Government has no power to engage anywhere in the work of constructing a railroad or canal. The decisions of this court are adverse to this contention. In 127 U. S. 1, 39, it was said:

"It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, travers-

ing states as well as territories, and employing the agency of state as well as Federal corporations. See *Pacific Railroad Removal cases*, 115 U. S. 1, 14, 18."

In 153 U. S. 525, it was said: "Congress may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the states. 4 Wheat. 316, 422; 9 Wheat. 738, 861, 873; 115 U. S. 1, 18; 127 U. S. 1, 39. Congress has likewise the power, exercised early in this century by successive acts in the Cumberland or National road, from the Potomac across the Alleghanies to the Ohio, to authorize the construction of a public highway connecting several states. See *Indiana v. U. S.* 148 U. S. 148." See also 148 U. S. 312.

These authorities recognize the power of Congress to construct interstate highways. *A fortiori*, Congress would have like power within the territories and outside of state lines, for there the legislative power of Congress is limited only by the provisions of the Constitution, and cannot conflict with the reserved power of the states. Plaintiff, recognizing the force of these decisions, seeks to obviate it by saying that the expressions were *obiter dicta*, but plainly they were not. They announce distinctly the opinion of this court on the questions presented, and would have to be overruled if a different doctrine were now announced. Congress has acted in reliance upon these decisions in many ways, and any change would disturb a vast volume of rights supposed to be fixed; but we see no reason to doubt the conclusions expressed in those opinions, and adhere to them. *Wilson v. Shaw*, 204 U. S. 32-35.

### Extent and Supremacy of Powers of United States Government

It is an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case the words of the constitution itself show which is to yield. "This constitution, and all laws which shall be made in pursuance thereof, shall be the supreme law of the land." Without the concurrent sovereignty referred to, the natural government would be nothing but an advisory government. Its executive power would be absolutely nullified. Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace while they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary



consequence of the positions assumed. If we indulge in such impracticable views as these, and keep on refining and rerefining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old confederation. It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction. 100 U. S. 371, 394. 135 U. S. 61.

The general government can only act through its officers and agents, and they must act within the states. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offence against the law of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection—if their protection must be left to the action of the state court—the operations of the general government may at any time be arrested at the will of one of its members.

The United States is a government with authority extending over the whole territory of the Union, acting upon the states and the people of the states. While it is limited in the number of its powers, so far as its sovereignty extends, it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the constitution; obstruct its authorized officers against its will; or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it. 135 U. S. 62.

### **Powers of United States Government Limited and General**

When the Constitution was under the discussions which preceded its ratification, it is well known that great apprehensions were expressed by many, lest the omission of some positive exception, from the powers delegated, of certain rights, and of the freedom of the press particularly, might expose them to the danger of being drawn, by construction, within some of the powers vested in Congress more especially of the power to make all laws necessary and proper for carrying their other powers into execution. In reply to this objection, it was invariably urged to be a fundamental and characteristic principle of the Constitution, that all powers not given by it were reserved; that no powers were given beyond those enumerated in the Constitution, and such as were fairly incident to them; that the power over the rights in question, and particularly over the press, was neither among the enumerated powers, nor incident to any of them; and consequently that an exercise of any such power would be manifest usurpation. It is painful to remark how much the arguments now employed in behalf of the Sedition Act are at variance with the reasoning which then justified the Constitution, and invited its ratification. 4 *Writings of Madison*, p. 545.

## Relation of United States Government to the Several States

The supreme authority in this country is divided between the government of the United States, whose action extends over the whole Union, but which possesses only certain powers enumerated in its written Constitution, and the separate governments of the several states, which retain all powers not delegated to the Union. The power expressly conferred upon congress to regulate commerce is absolute and complete in itself, with no limitations other than are prescribed in the constitution; is to a certain extent exclusively vested in congress, so far free from state action; is co-extensive with the subject on which it acts, and cannot stop at the external boundary of a state, but must enter into the interior of every state whenever required by the interests of commerce with foreign nations, does not comprehend the purely internal domestic commerce with foreign nations, or among the several states. This power, however, does not comprehend the purely internal domestic commerce of a state which is carried on between man and man within a state or between different parts of the same state.

The distinction is stated in the following comprehensive language: The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself. 9 Wheat. 195. 128 U. S. 16-17.

## Difference Between the Nation and the State

The National Government is an artificial creation, with no powers except those conferred by the instrument which created it. A State Government is a natural growth, which *prima facie* possesses all the powers incident to any government whatever. Hence, if the question arises whether a State legislature can pass a law on a given subject, the presumption is that it can do so: and positive grounds must be adduced to prove that it cannot. It may be restrained by some inhibition either in the Federal Constitution, or in the Constitution of its own State. But such inhibition must be affirmatively shown to have been imposed, or, to put the same point in other words, a State Constitution is held to be, not a document conferring defined and specified powers on the legislature, but one regulating and limiting that general authority which the representatives of the people enjoy *ipso jure* by their organization into a legislative body.

"It has never been questioned that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written Constitutions. That must be conceded to be a fundamental principle in the political organization of the American States.\* We cannot well comprehend how, upon principle, it could be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several State legislatures, saving only such restrictions, as are imposed by the Constitution of the United States or of the particular State in question."

"The people, in framing the Constitution, committed to the legislature the whole law-making powers of the State which they did not expressly or impliedly withhold. Plenary power in the legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception."

It must not, however, be supposed from these dicta that even if the States were independent commonwealths, the Federal Government having disappeared, their legislatures would enjoy anything approaching the omnipotence of the British Parliament, "whose power and jurisdiction is," says Edward Coke, "so transcendent and absolute that it cannot be confined, either for persons, or causes, within any bounds." "All mischiefs and grievances," adds Blackstone, "operations and remedies that transcend the ordinary course of the laws are within the reach of this extraordinary tribunal." Parliament being absolutely sovereign, can command, or extinguish and swallow up the executive and the judiciary, appropriating to itself their functions. But in America, a legislature is a legislature and nothing more. The same instrument which creates also the executive governor and the judges. They hold by a title as good as its own. If the legislature should pass a law depriving the governor of an executive conferred by the Constitution, that would be void. If the legislature attempted to interfere with the jurisdiction of the courts, their action would be even more palpably illegal and ineffectual. *Bryce's American Commonwealth, Vol. I, 428-29-30.*

The real blemishes in the system of State government are all found in the composition or conduct of the legislatures. They are the following:

Inferiority point of knowledge, of skill, and sometime of conscience, of the bulk of the men who fill these bodies.

Improvvidence in matters of finance.

Heedlessness in passing administrative bills.

Want of proper methods for dealing with local and special bills.

Failure of public opinion adequately to control legislation, and particularly special bills.

The practical result of these blemishes has been to create a large mass of State and local indebtedness which ought never to have been incurred, to allow foolish experiments in law-making to be tried, and to sanction a vast mass of private enterprises, in which public rights and public interests become the sport of speculators, or a source of gain to monopolists, with the incidental consequence of demoralizing

the legislators themselves and creating an often unjust prejudice against all corporate undertakings. *Bryce's American Commonwealth, Vol. I, 526.*

The Americans seem to reason thus: "Since a legislature is very far gone from righteousness, and of its own nature inclined to do evil, the less chance it has of doing evil the better. If it meets, it will pass bad laws. Let us therefore prevent it from meeting."

They are no doubt right as practical men. They are consistent, as sons of the Puritans in their application of the doctrine of original sin. But this is a rather pitiful result for self-governing democracy to have arrived at.

The European reader will ask, "Why all these efforts to deal with the symptoms of the malady itself? Why not reform the legislatures by inducing good men to enter them, and keeping a more constantly vigilant public opinion fixed upon them?" *Bryce's American Commonwealth, Vol. I, 536.*

The average American voter, belonging to the labouring or farming or shopkeeping class, troubles himself little about the conduct of State business. He voted the party ticket at elections as a good party man, and is pleased when his party wins. When a question comes up which interests him, like that of canal government, or the regulation of railway rates, or the limitation of the hours of the labor, he is eager to use his vote, and watches what passes in the legislature. He is sometimes excited over a contest for the governorship, and if the candidate of the other party is a stronger and more honest man, may possibly desert his party on that one issue. But in ordinary times he does not follow the proceedings of the legislature, as indeed how could he? Seeing that they are most scantily reported. The politics which he reads by preference are national politics; and especially whatever touches the next presidential election. In State contests that which chiefly fixes his attention is the influence of a State victory on an approaching national contest. *Bryce's American Commonwealth, Vol. I, 550.*

### **The United States a Union, But Not a Nation**

Mr. Calhoun thus declares the difference between a Union and a Nation:

We are as devoted to the Union as any portion of the American people; I use the phrase as meaning the people of the Union, but we see, in a *national* consolidated government, evils innumerable to us. Admit us to be a Nation and not an Union, and where would we stand? We are in the minority. We have peculiar institutions and peculiar productions, and shall we look to a mere numerical majority of the whole—the unsafest of all governments—for protection? I would rather trust a sovereign, rather an aristocracy—any form of government, than that. I hold that, whenever the idea becomes fixed, that the mere numerical majority have an inherent and indefeasible right to govern, constitutional liberty must cease. It is Dorrism. Rhode Island has had some experience of what that is,—and the last man I should suspect of advocating this doctrine as applied to the Union, is



the Senator from Rhode Island. It is bad enough when applied to a State, but when applied to our Union, it is ruinous. The true idea of a constitutional government is the reverse; a government of the whole,—a government which should fairly and fully express the sense of every portion, and thereby the sense of the whole, and not one that expresses simply the voice of the numerical majority, or the numerical minority. Either of them would be the government of a part over a part, and not the government of the whole. *Calhoun's Works*, pp. 357-8.

### The Purposes of the Union

The principal purposes to be answered by union are these—the common defense of the members; the preservation of the public peace as well against internal convulsions as external attacks; the regulation of commerce with other nations and between States; the superintendence of our intercourse, political and commercial, with foreign countries. *Hamilton in Federalist*, Number XXIII.

If the circumstances of our country are such as to demand a compound instead of a simple, a confederate instead of a sole, government, the essential point which will remain to be adjusted will be to discriminate the objects, as far as it can be done, which shall appertain to the different provinces or departments of power; allowing to each the most ample authority for fulfilling the objects committed to its charge. *Hamilton in Federalist*, Number XXIII.

A government, the constitution of which renders it unfit to be trusted with all the powers which a free people OUGHT TO DELEGATE TO ANY GOVERNMENT, would be unsafe and improper depositary of the NATIONAL INTERESTS. Wherever these can with propriety be confided, the coincident powers may safely accompany the subject. *Hamilton in Federalist*, Number XXIII.

### The United States a Union of States

In the important case of *Texas v. White*, 7 Wall. 700, we read as follows: "By the articles of confederation, the Union was declared to be perpetual. And when these articles were found to be inadequate to the exigencies of the country, the constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble if a perpetual unity more clearly than in these words. What can be indissoluble if a perpetual union made perfect is not? Thus, when a state has once become a member of the Union, 'there is no place for reconsideration or revocation, except through revolution, or through the consent of the States.' 'But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government, by the states. Without the states in union there could be no political body as the United States.'" *Black on Constitutional Laws*, 29.

### An Indissoluble Union of Indestructible States

The United States is an indissoluble union of indestructible states. No state has the right to secede from it. The Union could be terminated only by the agreement of the people or by revolution. *Black on Constitutional Law*, 28.

### Causes Tending to Destruction of the Union

Mr. Calhoun thus strongly states our Sectional parties or Geographical Politics:

So long as it continues, there can be no safety for the weaker section. It places in the hands of the stronger and hostile section, the power to crush her and her institutions; and leaves her no alternative, but to resist, or sink down into a colonial condition. This must be the consequence, if some effectual and appropriate remedy be not applied.

The nature of the disease is such, that nothing can reach it, short of some organic change,—a change which shall so modify the constitution, as to give to the weaker section, in some one form or another, a negative on the action of the government. Nothing short of this can protect the weaker, and restore harmony and tranquility to the Union, by arresting, effectually, the tendency of the dominant and stronger section to oppress the weaker. When the constitution was formed, the impression was strong, that the tendency to conflict would be between the larger and smaller States; and effectual provisions were, accordingly, made to guard against it. But experience has proved this to have been a mistake; and that, instead of being, as was then supposed, the conflict is between the two great sections, which are so strongly distinguished by their institutions, geographical character, productions and pursuits. Had this been then as clearly perceived as it is now, the same jealousy which so vigilantly watched and guarded against the danger of the larger States oppressing the smaller, would have taken equal precaution to guard against the same danger between the two sections. *1 Calhoun's Works, p. 391.*

Mr. Calhoun thus spoke of the causes which might destroy the Union and one of them came very near doing it, in 1861. He said:

To these fatal measures are to be attributed the violence of party struggles: the total disregard of the provisions of the constitution in respect to the election of the President; the predominance of the honors and emoluments of the government over every other consideration; the rise and growth of the abolition agitation; the formation of geographical parties; and the alienation and hostile feelings between the two great sections of the Union. These are all the unavoidable consequences of the government of the numerical majority, in a country of such great extent, and with such diversity of institutions and interests as distinguish ours. They will continue, with increased and increasing aggregation, until the end comes. *1 Calhoun's Works, p. 376.*

The vast power and patronage of the department are vested in a single officer, the President of the United States. Among these powers, the most prominent, as far as it relates to the present subject, are those which appertain to the administration of the government; to the office of commander in chief of the army and navy of the United States; to the appointment of the officers of the government, with few exceptions; and to the removal of them at his pleasure,—as his authority has been interpreted by Congress. These, and especially the

latter, have made his election the great and absorbing object of party struggles; and on this the appeal to force will be made, whenever the violence of the struggle and the corruption of parties will no longer submit to the decision of the ballot-box. To this end it must come, if the force impelling it in the other direction should not previously prevail. If it comes to this, it will be, in all probability, in a contested election; when the question will be, Which is the President? The incumbent,—if he should be one of the candidates,—or, if not, the candidate of the party in possession of power? Or of the party endeavoring to obtain possession? On such an issue, the appeal to force would make the *candidate* of the successful party, master of the whole,—and not the *commander*, as would be the case under different circumstances.

The contest would put an end, virtually, to the elective character of the department. *1 Calhoun's Works, pp. 377-378.*

The conflict will thus become one between the States, occupying the different sections; that is, between organized bodies on both sides; each, in the event of separation, having the means of avoiding the confusion and anarchy, to which the parts would be subject without such organization. This would contribute much to increase the power of resistance on the part of the weaker section against the stronger, in possession of the government. With these great advantages and resources, it is hardly possible that the parties occupying the weaker section, would consent, quietly, under any circumstances, to sink down from independent and equal sovereignties, into a dependent and colonial condition; and still less so, under the circumstances that would revolutionize them *internally*, and put their very existence, as a people, at stake. Never was there an issue between independent States that involved greater calamity to the conquered, than is involved in that between the States which compose the two sections of this Union. The condition of the weaker, should it sink from a state of independence and equality to one of dependence and subjection, would be more calamitous than ever before befell a civilized people. *1 Calhoun's Works, p. 380.*

### Division and Distribution of Governmental Powers

Mr. Webster thus speaks of the subject:

The separation of the powers of government into three departments, though all our constitutions profess to be founded on it, has nevertheless, never been perfectly established in any government of the world, and perhaps never can be. The general principle is of inestimable value, and the leading lines of distinction sufficiently plain; yet there are powers of so undecided a character, that they do not seem necessarily to range themselves under either head. And most of our constitutions, too, having laid down the general principle, immediately create exceptions. There do not exist, in the general science of government, or the received maxims of political law, such precise definitions as enable us always to say of a given power whether it be legislative, executive or judicial. And this is one reason, doubtless, why the Constitution, in conferring power on all the departments, proceeds not by general definition, but by specific enumeration. And,

again, it grants a power in general terms, but yet, in the same or some other article or section, imposes a limitation or qualification on the grant; and the grant and the limitation must, of course, be construed together. *4 Webster's Works, (7th ed.), p. 123.*

Notwithstanding the departments are called the legislative, the executive, and the judicial, we must yet look into the provisions of the Constitution itself, in order to learn, first, what powers the Constitution regards as legislative, executive, and judicial; and, in the next place, what portions or quantities of these powers are conferred on the respective departments; because no one will contend that *all* legislative power belongs to Congress, *all* executive power to the President, or *all* judicial power to the courts of the United States.

The first three articles of the Constitution, as all know, are taken up in prescribing the organization, and enumerating the powers, of the three departments. The first article treats of the legislature, and its first section is, "All legislative power, *herein granted*, shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The second article treats of the executive power, and its first section declares that "the executive power shall be vested in a President of the United States of America." The third article treats of the judicial power, and its first section declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish." *4 Webster's Works, (7th ed.), p. 124.*

The Federalist thus spoke on the subject:

The members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature, in this particular, their independence in every other would be merely nominal.

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of the attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. *Madison in The Federalist, Vol. I, Number LI.*

In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the



legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department? *Madison in The Federalist, Vol. I, Number LI.*

Mr. Madison further speaks on this subject :

One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended in such a manner as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny. Were the Federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. *Madison in The Federalist, Vol. I, Number XLVII.*

The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. *Madison in The Federalist, Vol. I, Number XLVII.*

From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." or, "if the power of judging be not separated from

the legislative and executive powers," he did not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROL over, the acts of each other. His meaning, as his own words, import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted. *Madison in The Federalist, Vol. I, Number XLVII.*

It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. *Madison in The Federalist, Vol. I, Number XLVIII.*

The founders of our republics have so much merit for the wisdom which they have displayed, that no task can be less pleasing than that of pointing out the errors into which they have fallen. A respect for truth, however, obliges us to remark, that they seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations. *Madison in The Federalist, Vol. I, Number XLVIII,*

Mr. Webster said: "The first object of a free people is the preservation of their liberty, and liberty is only to be preserved by maintaining constitutional restraints and just divisions of political power. Nothing is more deceptive or more dangerous than the pretence of a desire to simplify government.

"The simplest governments are despotisms; the next simplest, limited monarchies; but all republics, all governments of law, must impose numerous limitations and qualifications of authority, and give many positive and many qualified rights. In other words, they must be subject to rule and regulation. This is the very essence of free political institutions.

"The spirit of liberty is, indeed, a bold and fearless spirit; but it is also a sharp-sighted spirit; it is a cautious, sagacious, discriminating, far-seeing intelligence; it is jealous of encroachment, jealous of power, jealous of man. It demands checks; it seeks for guards; it insists on securities; it entrenches itself behind strong defences, and fortifies itself with all possible care against the assaults of ambition and passion. It does not trust the amiable weaknesses of human nature, and therefore it will not permit power to overstep its prescribed limits, though benevolence, good intent, and patriotic purpose come along with it." *Taken from Lieber's Civil and Self-Government, 153-4.*

Unity of power, if sought for in wide-spread democracy, must lead always to monarchical absolutism. Virtually it is such; for it is indifferent what the appearance or name may be to the democracy, is not

a unit in reality; yet actual absolutism existing, it must be wielded by one man. All absolutism is therefore essentially a one-man government. The ruler may not immediately take the crown; the pear may not be ripe, as Napoleon said to Sieyes; but it soon ripens, and then the avowed absolute power is traditional, because the tradition itself brings along with it some limitations by popular opinion. Of all absolute monarchs, however, it is true that "it is the vice of a pure (absolute) monarchy to raise the power so high and to surround it with so much grandeur that the head is turned of him who possesses it, and that those who are beneath him scarcely dare to look at him. The sovereign believes himself a god, the people fall into idolatry. People may then write on the duties of kings and the rights of subjects; they may even constantly preach upon them, but the situations have greater power than the words, and when the inequality is immense, the one easily forgets his duties, the others their rights." *Lieber's Civil Liberty and Self-Government, 155.*

Montesquieu says:

I should be glad to inquire into the distribution of the three powers in all the moderate governments we are acquainted with, in order to calculate the degrees of liberty which each may enjoy. But we must not always exhaust a subject, so as to leave no work at all for the reader. My business is not to make people read, but to make them think. *Montesquieu's Works, Book XI, Chapter XX.*

There is no doubt but this distribution of powers was due to Baron Montesquieu's work on the Spirit of Law. Federalist Nos. 47, 51. Mr. Tucker in his work on the Constitution has pointed out to what extent Montesquieu's work was followed, and to what extent it was departed from. 1 Tucker's Constitution, §390, et seq.

The effect of the Federal Constitution was not alone to distribute all the powers granted, among the three departments, but it also had the effect to distribute all the powers of the several states between two systems of government, the State and Federal; thus forming a double check upon the centralization of power, which Montesquieu and Jefferson had shown to be always so fatal to liberty. Each government thus watches the other, to see that no power of the one is usurped by the other.

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary

control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of every thing, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Most kingdoms in Europe enjoy a moderate government, because the prince, who is invested with the first powers, leaves the third to his subjects.

In Turkey, where these three powers are united in the sultan's person, the subjects groan under the most dreadful oppression.

In the republics of Italy, where these three powers are united, there is less liberty than in our monarchies. *Montesquieu's Works, Book XI, Chapter VI.*

There was not in our government a perfect distribution of powers to their respective departments, but each was given a check upon the others. The appointing, the treaty making, and war declaring power, naturally belongs to the Executive department. The Senate holds a check upon the first two, and the last is given to Congress. The power of impeachment is a Judicial power, and that is likewise given to Congress. The Executive is given the power to recommend laws to Congress, and also the power to veto, which is a check upon the law making power; while the Judicial department is given the power to construe the Constitution and the statutes, and to declare when they conflict, and by this means to prevent the Congress and the President from transcending the powers conferred upon them by the Constitution.

### Distribution of Powers Between United States and State Governments

Mr. Bryce thus describes the distribution:

The distribution of powers between the National and the State government is effected in two ways—Positively, by conferring certain powers on the National government; Negatively, by imposing certain restrictions on the States. It would have been superfluous to confer any powers on the States, because they retain all powers not actually taken from them. A lawyer may think that it was equally unnecessary and, so to speak, inartistic, to lay any prohibitions on the National government, because it could *ex hypothesi* exercise no powers not expressly granted. However, the anxiety of the States to fetter the master they were giving themselves caused the introduction of provisions qualifying the grant of express powers, and interdicting the National government from various kinds of action on which it might otherwise have been tempted to enter. The matter is further complicated by the fact that the grant of power to the National government is not in all



cases an exclusive grant: i. e. there are matters which both, or either, the States and the National government may deal with. "The men of a power to Congress does not of itself, in most cases, imply a prohibition upon the States to exercise the like power. . . . It is not the mere exercise of the National power, but its exercise, which is incompatible with the exercise of the same power by the States. Thus we may distinguish the following classes of governmental powers:

Powers vested in the National government alone.

Powers vested in the States alone.

Powers exercisable by either the National government or the States.

Powers forbidden to the National government.

Powers forbidden to the States.

It might be thought that the two latter classes are superfluous, because whatever is forbidden to the National government is permitted to the States, and conversely, whatever is forbidden to the States is permitted to the National government. But this is not so. For instance, Congress can grant no title of nobility (Art. i, Sec. 9). But neither can a State do so (Art. i. 10). The National government cannot take private property for public use without just compensation (Amendment v.) Apparently neither can any State do so (Amendment xiv. as interpreted in several cases). So no State can pass any law impairing the obligation of a contract (Art. i. Sec. 10). But the National government, although not subject to a similar direct prohibition, has received no general power to legislate as regards ordinary contracts, and might therefore in some cases find itself equally unable to pass a law which a State legislature, though for a different reason, could not pass. So no State can pass any *ex post facto* law. Neither can Congress. *Bryce's American Commonwealth, Vol. I. 306-7.*

A State is, within its proper sphere, just as legally supreme, just as well entitled to give effect to its own will, as is the National government within its sphere; and for the same reason. All authority flows from the people. The people have given part of their supreme authority to the central, part to the State Governments. Both hold by the same title, and therefore the National government, although superior wherever there is a concurrence of powers, has no more right to trespass upon the domain of a State than a State has upon the domain of Federal action. "When a particular power," says Judge Cooley, "is found to belong to the States, they are entitled to the same complete independence in its exercise as is the National government in wielding its own authority." That the course which a State is following is pernicious, that its motives are bad and its sentiments disloyal to the Union, makes no difference until or unless it infringes on the sphere of Federal authority. *Bryce's American Commonwealth, Vol. I, 314.*

The States serve to form the National government by choosing presidential electors, by choosing senators, and by fixing the franchises. No difficulty has ever arisen (except during the Civil War) from any unwillingness of the States to discharge these duties, for each State is eager to exercise as much influence as it can on the national executive and Congress. But note how much latitude has been left to the States. A State may appoint its presidential electors in any way it

pleases. All States now do appoint them by popular vote. But during the first thirty years of the Union many States left the choice of electors to their respective legislatures. *Bryce's American Commonwealth*, Vol. I, 319.

The Federal Constitution deprives the States of certain powers they would otherwise enjoy. Some of these, such as that of making treaties, are obviously unpermissible, and such as the State need not regret. Others, however, seriously restrain their daily action. They are liable to be sued in the Federal courts by another State or by a foreign power. They cannot, except with the consent of Congress, tax exports or imports, or in any case pass a law impairing the obligation of a contract. They must surrender fugitives from the justice of any other State. *Bryce's American Commonwealth*, Vol. I, 320.

Mr. Hamilton, in one number of the *Federalist*, remarks that, "In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and usurpations are guarded against, by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself."

Mr. Jefferson while Vice-President, in writing the Kentucky Resolution in 1798 said:

"The Government, created by this compact, was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but, as in all other cases of compact between parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress."

To whatever school of construction our statesmen have belonged, they have generally been agreed in one thing.—that the chief excellence of our system of government consists in its apportionment of powers, and that the perpetuation of this should be matter of primary solicitude. Mr. Everett expresses the fundamental idea of our system in his *History of Liberty*. "The framers of the Constitution," he says, "devised a scheme of confederate and representative sovereign republics, united in a happy distribution of powers, which reserving to the separate States all the political functions essential to local

administration and private justice, bestowed upon the general government those and those only required for the service of the whole.' Speeches and Orations, I. 167. Mr. Webster may also be quoted: "Circumstances," he says, "have wrought out for us a state of things which, in other times and in other regions, philosophy has dreamed of, and theory has proposed, and speculation has suggested, but which man has never been able to accomplish. I mean the government of a great nation over a vastly extended portion of surface of the earth, by means of local institutions for local purposes and general institutions for general purposes. I know of nothing in the history of the world, notwithstanding the great league of Grecian states, notwithstanding the success of the Roman system,—and certainly there is no exception to the remark in modern history,—I know of nothing so suitable on the whole for the great interests of a great people, spread over a large portion of the globe, as the provisions of local legislation for local and municipal purposes, with, not a confederacy, nor a loose binding together of separate parts, but a limited, positive, general government, for positive, general purposes, over the whole." Webster's Works, II. 207. Particularly forcible in the same connection is the language of Mr. Jefferson. "The State," he says, "as well as their central government, like the planets revolving around their common sun, acting and acted upon according to their respective weights and distances, will produce that beautiful equilibrium on which our Constitution is founded, and which it will exhibit to the world in a degree of perfection unexampled but in the planetary system itself. The enlightened statesman, therefore, will endeavor to preserve the weight and influence of every part, as too much given to any member of it would destroy the general equilibrium." Letter to Fitzhugh, Works, IV. 217. See Story on the Constitution (Vol. V, p. 715 (note)).

### **Necessity of Division of Governmental Powers**

Mr. Calhoun thus states the case:

Indeed, it would seem impossible to produce organic action by a single power,—and that it must ever be the result of two or more powers, mutually acting and reacting on each other. And hence the political axiom,—that there can be no constitution, without a division of power, and no liberty without a constitution. To this a kindred axiom may be added;—that there can be no division of power, without a self-protecting power in each of the parts into which it may be divided; or in a superior power to protect each against the other.

Without a division of power there can be no organism; and without the power of self-protection, or a superior power to restrict each to its appropriate sphere, the stronger will absorb the weaker, and concentrate all power in itself. *J. Calhoun's Works, p. 237.*

### The Three Departments of Government

Mr. Jefferson thoroughly believed in the independence of the three Departments of Government. He did not believe the Judiciary was given the power or the function to construe the Constitution, for either of the other departments. He contended that if the Judiciary were to say to the other departments of government what the Constitution means, that the Constitution would be a mere thing of wax to be shaped as the Judiciary might think proper. He thus illustrates his ideas on the subject, in 1819, seven years before his death. In writing to Judge Roane, who then requested his views, he says:

In denying the right they usurp of exclusively explaining the Constitution, I go further than you do, if I understand rightly your quotation from the Federalist, of an opinion that "the judiciary is the last resort in relation to the other departments of the government, but not in relation to the rights of the parties to the compact under which the judiciary is derived." If this opinion be sound, then indeed is our Constitution a complete *felo de se*. For intending to establish three departments, co-ordinate and independent, that they might check and balance one another, it was given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation. *15 Jefferson's Writings, (Mem. ed.), pp. 212-213.*

Again in the same letter he adds:

I will explain myself by examples, which, having occurred while I was in office, are better known to me, and the principles which governed them.

A legislature had passed the sedition law. The federal courts had subjected certain individuals to its penalties of fine and imprisonment. On coming into office, I released these individuals by the power of pardon committed to executive discretion, which could never be more properly exercised than where citizens were suffering without the authority of law, or, which was equivalent, under a law unauthorized by the Constitution, and therefore null. In the case of Marbury and Madison, the federal judges declared that commissions, signed and sealed by the President, were valid, although not delivered. I deemed delivery essential to complete a deed, which, as long as it remains in the hands of the party, is as yet no deed; it is *in posse* only, but not *in esse*, and I withheld delivery of the commissions. They cannot issue a mandamus to the President or legislature, or to any of their officers. *15 Jefferson's Writings, (Mem. ed.), p. 214.*

These departments, under our form of government, are co-ordinate in dignity. Neither of them is intended, by the theory of our Consti-



tution, to be subjected to the other. The President cannot be compelled to make a treaty, or to appoint anybody to office that he does not wish to. The Legislature cannot be compelled to pass any laws, and it alone can exercise that function. The Judiciary alone can construe them, when enacted, and enforce them by proper judgments of the various courts. Mr. Justice Wayne has advanced this idea in very appropriate terms. "The departments of the Government are legislative, executive, and judicial. They are co-ordinate in degree to the extent of the powers delegated to each of them. Each in the exercise of its power is independent of the other, but all rightfully done by either is binding upon the others. The Constitution is supreme over all of them, because the people who ratified it have made it so." *Miller's Const.* p. 89.

### Independence of the Departments of Government

This question became acute in the trial of Aaron Burr for treason, in which the question as to whether or not a *subpoena duces tecum* could issue against the President. Mr. Marshall, then Chief Justice, thought it could, and his opinion in the case gives his view, while Mr. Jefferson, who was then President, gave his in a letter to the Attorney General, and among other things, says:

"The leading principle of our Constitution is the independence of the legislative, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, and to imprisonment for disobedience, if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south and east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive." 11 Jefferson's Writings, (mem. ed.), p. 241.

### Authority of Departments of Government

The executive department of the government, to which is intrusted the control of the subject-matter, must necessarily determine all questions appertaining to the employment and payment of such temporary agents, and the exigency which demands their employment. The secretary of the navy represents the president, and exercises his power on the subjects confided to his department. He is responsible to the people and the law for any abuse of the powers intrusted to him. His acts and decisions on subjects submitted to his jurisdiction and con-

trol by the constitution and laws, do not require the approval of any officer of another department to make them valid and conclusive. *18 How. 96.*

### **Balance of Power Between Departments of Government**

The difference between the departments undoubtedly is, that the legislature makes, the executive executes and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily. *10 Wheat. 46.*

The departments of government are legislative, executive, and judicial. They are co-ordinate in degree to the extent of the powers delegated to each of them. Each, in the exercise of its powers, is independent of the other, but all, rightfully done by either, is binding upon the others. The constitution is supreme over all of them, because the people who ratified it have made it so; consequently, anything which may be done unauthorized by it is unlawful. *18 How. 348.*

### **Powers and Duties of Departments of Government**

There are many authorities conferred on the different departments of the government, which, for their due execution, require services and duties to be performed, which are not strictly appertaining to or developed upon any particular authority, business, or duty, has always been deemed to possess the right to employ the proper persons to perform the same, as the appropriate means to carry into effect the required end; and also the right to allow persons so employed a suitable compensation. *1 Pet. 1; 7 Pet. 18; 7 Pet. 28.*

The head of a department of the government has not a right to review the decision of his predecessor, allowing a credit, except to correct some error of calculation; if he is of opinion that the allowance was wrongful, he must have a suit brought. *15 Pet. 377.*

### **The Department of the Interior**

The Department of the Interior is one of the executive departments of the government. It was made so March 30, 1849. It is specially charged with the supervision of certain executive bureaus. Its present jurisdiction is defined in sec. 441 of Rev. Stat. The government printing-office has never been placed under its jurisdiction by any express statute. *91 U. S. 304.*

### **Checks and Balances**

Mr. Wilson, the President, in his book on Congressional Government, thus speaks on the subject:

The best rulers are always those to whom great power is entrusted in such a manner as to make them feel that they will surely be abundantly honored and recompensed for a just and patriotic use of it, and to make them know that nothing can shield them from full retribution for every abuse of it.

It is, therefore, manifestly a radical defect in our federal system that it parcels out power and confuses responsibility as it does. The main purpose of the Convention of 1787 seems to have been to accomplish this grievous mistake. The "literary theory" of checks and balances is simply a consistent account of what our constitution-makers tried to do; and those checks and balances have proved mischievous just to the extent to which they have succeeded in establishing themselves, as realities. It is quite safe to say that were it possible to call together again the members of that wonderful Convention to view the works of their hands in the light of the century that has tested it, they would be the first to admit that the only fruit of dividing power had been to make it irresponsible.<sup>1</sup> *Wilson's Congressional Government*, p. 284-5.

It is something more than natural that the Convention of 1787 should desire to erect a Congress which would not be subservient and an executive which would not be despotic. And it was equally to have been expected that they should regard an absolute separation of these two great branches of the system as the only effectual means for the accomplishment of that much desired end. It was impossible that they could believe that executive and legislative could be brought into close relations of co-operation and mutual confidence without being tempted, nay, even bidden, to collude. How could either maintain its independence of action unless each were to have the guaranty of the Constitution that its own domain should be absolutely safe from invasion, its own prerogatives absolutely free from challenge? "They shrank from placing sovereign power anywhere. They feared that it would create tyranny; George III. had been a tyrant to them, and come what might they would not make a George III." They would conquer, by dividing, the power they so much feared to see in any single hand. *Wilson's Congressional Government*, p. 309.

### Amendments and Changes of the Constitution

Mr. Wilson concludes his book as follows:

The charm of our constitutional ideal has now been long enough wound up to enable sober men who do not believe in political witchcraft to judge what it has accomplished, and is likely still to accomplish, without further winding. The Constitution is not honored by blind worship. The more open-eyed we become, as a nation, to its defects, and the prompter we grow in applying with the unhesitating courage of conviction all thoroughly-tested or well-considered expedients necessary to make self-government among us a straightforward thing of simple method, single, unrestrained power, and clear responsibility, the nearer will we approach to the second sense and practicable genius of the great and honorable statesmen of 1787. And the first step towards emancipation from the timidity and false pride which have led us to seek to thrive despite the defects of our national system rather than seem to deny its perfection is a fearless criticism of that system. When we shall have examined all its parts without sentiment, and gauged all its functions by the standards of practical sense, we shall have established anew our right to the claim of political sagacity; and

<sup>1</sup>Is this possible? To the Compiler it is inconceivable.

it will remain only to act intelligently upon what our opened eyes have seen in order to prove again the justice of our claim to political genius. *Wilson's Congressional Government*, pp. 332-3.

### Checks and Balances

So far as the compiler recalls, Mr. Wilson is the only American president, statesman, or even writer or public speaker of any notoriety, who opposes the American system of government, by which governmental power is divided, and the system of checks and balances established by the Constitution. The division of powers and checks and balances to him was a grievous mistake. He believes we have progressed in spite of, and not by reason of, this part of our system. He believes that these provisions are and will be disregarded by those who administer the government. He believes the Constitution has been and will continue to be amended without constitutionally amending it. Mr. Wilson believes with Mr. Bagehot that this division of powers was a grievous and basic error in the formation of our government. Strange as it may seem, most of those statesmen who constructed and planned, as well as those who have construed, enforced and executed the Constitution, believe this to be the crowning virtue of our system of government. See the excerpts from the greatest American and English statesmen, which precede and follow Mr. Wilson's criticism. This book of his is indeed a "fearless" and severe criticism of our government.

Mr. Jefferson thus points out the blessings of the system :

"It is a fatal heresy to suppose that either our State governments are superior to the federal, or the federal to the States. The people, to whom all authority belongs, have divided the powers of government into two distinct departments, the leading characters of which are foreign and domestic; and they have appointed for each a distinct set of functionaries. These they have made co-ordinate, checking and balancing each other, like the three cardinal departments in the individual States: each equally supreme as to the power delegated to itself, and neither authorized ultimately to decide what belongs to itself, or to its coparcenor in government. As independent, in fact, as different nations, a spirit of forbearance and compromise, therefore, and not of encroachment and usurpation, is the healing balm of such a Constitution; and each party should prudently shrink from all approach to the line of demarcation, instead of rashly overleaping it, or throwing grapples ahead to haul to hereafter. But, finally, the peculiar happiness of our blessed system is, that in differences of opinion between these different sets of servants, the appeal is to neither, but to their employers peaceably assembled by their representatives in convention. This is more rational than the *jus fortioris*, or the cannon's mouth, the *ultima et sola ratio regum*. 15 *Jefferson's Writings*, (*Mem. ed.*), pp. 328-9.



Washington, in his farewell address, said :

There is an opinion, that parties in free countries are useful checks upon the administration of the Government, and serve to keep alive the spirit of Liberty. This within certain bounds is probably true; and in Governments of a Monarchical cast, Patriotism may look with indulgence, if not with favor, upon the spirit of party. But in those of the popular character, in Governments purely elective, it is a spirit not to be encouraged. *Writings of Washington, Vol. 12, 225.*

And, there being constant danger of excess, the effort ought to be, by force of public opinion, to mitigate and assuage it. A fire not to be quenched, it demands a uniform vigilance to prevent its bursting into a flame, lest, instead of warming, it should consume.

It is important, likewise, that the habits of thinking in a free country should inspire caution, in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of the department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power by dividing and distributing it into different depositories, and constituting each the Guardian of the Public Weal against invasions by the others, has been evinced by experiments ancient and modern; some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them. *Writings of Washington, Vol. 12, 226.*

Mr. Jefferson thus expresses his views to a friend :

The way to have good and safe government, is not to trust it all to one, but to divide it among the many, distributing to every one exactly the functions he is competent to. Let the national government be entrusted with the defence of the nation, and its foreign and federal relations; the State governments with the civil rights, laws, police, and administration of what concerns the State generally; the counties with the local concerns of the counties, and each ward direct the interests within itself. It is by dividing and subdividing these republics from the great national one down through all its subordinations, until it ends in the administration of every man's farm by himself; by placing under every one what his own eye may superintend, that all will be done for the best. What has destroyed liberty and the rights of man in every government which has ever existed under the sun? The generalizing and concentrating all cares and powers into one body, no matter whether of the autocrats of Russia or France, or of the aristocrats of a Venetian senate. *14 Jefferson's Writings, (Mem. ed.), p. 421.*

NOTE.—Mr. Wilson evidently does not believe in this same kind of government, in which Washington and Jefferson believed.

The elementary republics of the wards, the county republics, the State republics, and the republic of the Union, would form a gradation of authorities, standing each on the basis of law, holding every one its delegated share of powers, and constituting truly a system of funda-

mental checks and balances for the government. Where man is a sharer in the direction of his ward-republic, or of some of the higher ones, and feels that he is a participator in the government of affairs, not merely at an election one day in the year, but every day; when there shall not be a man in the State who will not be a member of some one of its councils, great or small, he will let the heart be torn out of his body sooner than his power be wrested from him by a Caesar or a Bonaparte. How powerfully did we feel the energy of this organization in the case of embargo? I felt the foundations of the government shaken under my feet by the New England township. *14 Jefferson's Writings, (Mem. ed.), p. 422.*

Mr. Adams and Mr. Jefferson had much correspondence on the absolute powers of government, the distribution of, and the checks and balances Mr. Adams thus writes to Mr. Jefferson:

You ask, how it has happened that all Europe has acted on the principle, "that Power was Right." I know not what answer to give you, but this, that Power always sincerely, conscientiously, *de tres bon foi*, believes itself right. Power always thinks it has a great soul, and vast views, beyond the comprehension of the weak; and that it is doing God service, when it is violating all His laws. Our passions, ambition, avarice, love, resentment, etc., possess so much metaphysical subtlety, and so much overpowering eloquence, that they insinuate themselves into the understanding and the conscience, and convert both to their party; and I may be deceived as much as any of them, when I say, that Power must never be trusted without a check. *14 Jefferson's Writings, (Mem. ed.). pp. 426-7.*

Mr. Black thus gives the origin of the system:

The idea of an apportionment of the powers of government, and of their separation into three co-ordinate departments, is not a modern invention. It was suggested by Aristotle in his treaties on Politics, and was not unfamiliar to the more advanced of the medieval jurists. But the importance of this division of power, with the principle of classification, were never fully apprehended, in theory, until Montesquieu gave to the world his great work on the "Spirit of the Laws." *Black on Constitutional Laws, 74.*

Judge Venable thus speaks of this theory of government:

The theory of checks and balances came from Montesquieu, whose views were adopted and popularized by Blackstone. Montesquieu thought he had discovered the perfection of an adjustment in the British Constitution. There he found what he supposed to be a system of checks and balances; the powers were distributed, according to their nature as legislative, executive and judicial, amongst three depositaries; each was able to protect itself against the others. The classes of society were also balances against one another in the bi-chamber organization of parliament. The diffusion of limited powers of legislation and administration over the country amongst the shires and towns, prevented the encroachment of the central power. At this point it touched the theory of local self-government. This elaborate and nice

contrivance made a sort of equilibrium; and, this equilibrium being preserved, liberty and progress were reasonably safe. *Richard M. Venable, in Report of American Bar Association, Vol. 8, 254.*

The theory of equilibrated adjustments between state and nation is based on the analogy between centrifugal and centripetal forces, and the necessity of their balance in order to preserve a true orbital movement. This is elaborately discussed in the *Federalist*. It propounded the doctrine that the federal government, if too much power was committed to it, would destroy the states and lead to monarchy and absolutism. But if too much power was left to the states, they would drift from their moorings, and anarchy would result. It was supposed to be established by the history of ancient and medieval confederations. The rewritten history of federal governments, however, shows deeper causes for their disruption than any mere want of balance between central and confederated governments. This theory had little to do with the partition of powers made by the constitution, but did yeoman's service in procuring its ratification, and has always been popular. One of the few comparisons which seems never to be forgotten by the orator, or to pall on the popular taste, is that which likens the Union to the solar system. *Richard M. Venable, in Report of American Bar Association, Vol. 8, 255.*

From the very settlement of America there had been a partition of powers. During the colonial period matters of imperial concern had belonged to the imperial government, and matters of local concern to the colonies. There was unquestionably a power in the crown to revise and veto local measures, but the power was not systematically exercised. The colonists continued to regulate their local affairs with only occasional interferences from beyond the sea. The sentiment that they had the right to do so grew stronger and stronger; and interferences from England, which gave offense to this sentiment, did much to create the alienation from the mother country which culminated in the Revolution. *Richard M. Venable, in Report of American Bar Association, Vol. 8, 236.*

The Articles of Confederation for the first time made an express delegation of powers to the national government; but they did not confer on it the essential power of regulating commerce, and by them the impracticable method of acting by requisitions on the states was established. The total collapse of this government was due more to the defective partition of powers between it and the states, than to the anomalous and amorphous character of its structure as a government. *Richard M. Venable, in Report of American Bar Association, Vol. 8, 236-7.*

The convention, therefore, in making the partition of powers contained in the constitution, merely registered a public opinion so universal that there was little or no dissent. The partition was actually made by an historical evolution, and was not the intellectual creation of any man or body of men. *Richard M. Venable, in Report of American Bar Association, Vol. 8, 238.*

According to the Dred Scott case, the constitution recognized and protected property in slaves. To hold that the President could under the war power liberate slaves by proclamation, was to hold that a prop-

erty recognized and protected by one part of the constitution could be destroyed by implication from another part. The constitution gave to each state a right of representation in Congress. If the Southern States were still in the Union, it was impossible by any legitimate construction of the constitution to deny to them this right expressly granted in one part by powers implied from another part.

The situation was rendered somewhat ludicrous by the apparent revolution in opinion North and South. During the war the South had said, "We are out of the Union and had the right to go out." The North had said, "The South was not out of the Union and had no right to go out." The war being over, the South says, "Very well, you have convinced us by very solid reasoning. Here we are without representatives, entitled, on your own view, to be readmitted to participation in the government. If we can not destroy the constitution, you can not suspend it." *Richard M. Venable, in Report of American Bar Association, Vol. 8, 244.*

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the majority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority—that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. *Madison in The Federalist, Vol. I, Number LI.*

Mr. Bryce thus points out some advantages:

The Constitution was avowedly created as an instrument of checks and balances. Each branch of the National government was to restrain the others, and maintain the equipoise of the whole. The legislature was to balance the executive, and the judiciary both. The two houses of the legislature were to balance one another. The National government, taking all its branches together, was balanced against the State governments. As this equilibrium was placed under the protection of a document, unchangeable save by the people themselves, no one of the branches of the National government has been able to absorb or override the others, as the House of Commons has overridden and sub-



jected the Crown and the House of Lords. Each branch maintains its independence, and can, within certain limits, defy the others. *Bryce's American Commonwealth, Vol. I, 390.*

Now and then the centralizing process was checked. Georgia defied the Supreme court in 1830-32, and was not made to bend because the executive sided with her. South Carolina defied Congress and the President in 1832, and the issue was settled by a compromise. Acute foreign observers then and often during the period that followed predicted the dissolution of the Union. For some years before the outbreak of the Civil War the tie of obedience to the National government was palpably loosened over a large part of the country. But during and after the war the former tendency resumed its action, swifter and more potent than before. *Bryce's American Commonwealth, Vol. I, 393.*

The dominance of the centralizing tendencies is not wholly or even mainly due to those amendments. It had begun before them. It would have come about, though less completely, without them. It has been due not only to these amendments but also—

To the extensive interpretation by the judiciary of the powers which the Constitution vests in the National government.

To the passing by Congress of statutes on topics not exclusively reserved to the States, statutes which have sensibly narrowed the field of State action.

To exertions of executive power, which, having been approved by the people, and not condemned by the courts, have passed into precedents.

These have been the modes in which the centralizing tendency has shown itself and prevailed. *Bryce's American Commonwealth, Vol. I, 393-4.*

To expect any form of words, however weightily conceived, with whatever sanctions enacted, permanently to restrain the passions and interests of men is to expect the impossible. Beyond a certain point, you can not protect the people against themselves any more than you can to use the familiar American expression, lift yourself from the ground by your own boot-straps. *Bryce's American Commonwealth, Vol. I, 396.*

To cling to the letter of a Constitution when the welfare of the country for whose sake the Constitution exists is at stake, would be to seek to preserve life at the cost of all that makes life worth living—*propter vitam vivendi perdere causas.*

Nevertheless the rigid Constitution of the United States has rendered, and renders now, inestimable services. It opposes obstacles too rash and hasty change. It secures time for deliberation. It forces the people to think seriously before they alter it or pardon a transgression of it. *Bryce's American Commonwealth, Vol. I, 396.*

President Wilson thus sets forth the statement of the Elder Adams and others as to our checks and balances of Governmental powers and functions :

In 1814 John Adams in his letter to John Taylor. "Is there," says Mr. Adams, "a constitution upon record more complicated with balances

than ours? In the first place, eighteen states and some territories are balanced against the national government. \* \* \* In the second place, the House of Representatives is balanced against the Senate, the Senate against the House. In the third place, the executive authority is, in some degree, balanced against the legislative. In the fourth place, the judicial power is balanced against the House, the Senate, the executive power, and the state governments. In the fifth place, the Senate is balanced against the President in all appointments of office, and in all treaties. \* \* \* In the sixth place, the people hold in their hands the balance against their own representatives, by biennial \* \* \* elections. In the seventh place, the legislatures of the several states are balanced against the Senate by sextennial elections. In the eighth place, the electors are balanced against the people in the choice of the President. Here is a complicated refinement of balances, which, for anything I recollect, is an invention of our own and peculiar to us." *Wilson's Congressional Government*, pp. 12, 13.

There never was any great likelihood that the national government would care to take from the States their plainer prerogatives, but there was always a violent probability that it would here and there steal a march over the borders where territory like its own invited it to approbation; and it was for a mutual defense of such border-land that the two governments were given the right to halt upon one another. It was purposed to guard not against a revolution, but against unrestrained exercise of questionable powers. *Wilson's Congressional Government*, p. 14.

Manifestly the powers reserved to the States were expected to serve as a very real and potent check upon the Federal government; and yet we can see plainly enough now that this balance of state against national authorities has proved, of all constitutional checks, the least effectual. The proof of the pudding is the eating thereof, and we can nowadays detect in it none of that strong flavor of state sovereignty which its cooks thought they were giving it. It smacks, rather, of federal omnipotence, which they thought to mix in only in very small and judicious quantities. "From the nature of the case," as Judge Cooley says, "it was impossible that the powers reserved to the States should constitute a restraint upon the increase of federal power, to the extent that was at first expected. The federal government was necessarily made the final judge of its own authority, and the executor of its own will, and an effectual check to the gradual amplification of its jurisdiction." *Wilson's Congressional Government*, p. 17.

The States are absolutely debarred even from any effective defense of their plain prerogatives, because not they, but the national authorities, are commissioned to determine with decisive and unchallenged authoritativeness what state powers shall be recognized in each case of contest or of conflict. In short, one of the privileges which the States have resigned into the hands of the federal government is the all-inclusive privilege of determining what they themselves can do. Federal courts can annul state action, but state courts can not arrest the growth of congressional power. *Wilson's Congressional Government*, p. 24.

Judge Cooley can say without fear of contradiction that "The effectual checks upon the encroachments of Federal upon State power must be looked for, not in the state power of resistance, but in the choice of representatives, senators, and presidents holding just constitutional views, and in a federal supreme court with competent power to restrain all departments and all officers within the limits of their just authority, so far as their acts may become the subject of judicial cognizance."

Indeed it is quite evident that if Federal power be not altogether irresponsible, it is the federal judiciary which is the only effectual balance wheel of the whole system. The Federal judges hold in their hands the fate of state powers, and theirs is the only authority that can draw effective rein on the career of Congress. *Wilson's Congressional Government*, pp. 33, 34.

The legislature is the aggressive spirit. It is the motive power of the government, and unless the judiciary can check it, the courts are of comparatively little worth as balance wheels in the system. It is the subtle, stealthy, almost imperceptible encroachments of policy, of political action, which constitute the precedents upon which additional prerogatives are generally reared; and yet these are the very encroachments with which it is the hardest for the courts to deal, and concerning which, accordingly, the federal courts have declared themselves unauthorized to hold any opinions. *Wilson's Congressional Government*, p. 36.

But besides and above all this, the national courts are for the most part in the power of Congress. Even the Supreme Court is not beyond its control; for it is the legislative privilege to increase, whenever the legislative will so pleases, the number of judges on the supreme bench,—to "dilute the Constitution," as Webster once put it, "by creating a court which shall construe away its provisions;" and this on one memorable occasion it did choose to do. In December, 1869, the Supreme Court decided against the constitutionality of Congress's pet Legal Tender Acts; and in the following March a vacancy on the bench opportunely occurring, and a new justiceship having been created to meet the emergency, the Senate gave the President to understand that no nominee unfavorable to the debated acts would be confirmed, two justices of the predominant party's way of thinking were appointed, the hostile majority of the court was outvoted, and the obnoxious decision reversed. *Wilson's Congressional Government*, p. 38.

Mr. Benton, in an address before the American Bar Association, said:

The original idea of sovereignty was embodied in that of a king who exercised all the functions of government, making law, applying it, and executing as well. That gave place to other crude ideas of a parliament which should be omnipotent and subject to no control. The developments of enlightened experience have shown that parliaments or legislatures should also be regulated and controlled by law, and that the function of making laws should be kept distinct from that of de-

riding contests or applying law, hence we have express provisions in the constitutions of many states prohibiting the departments of government from encroaching upon the functions of others. This separation and co-ordination of the different departments of government is the improvement which republicanism is now making upon the principles of government. It is the contribution of our day to constitutional law. *Reuben C. Benton, in Report of American Bar Association, Vol. 8, 276.*

The great Frenchman, Tocqueville, looking at our institutions, was amazed at the simple fact. In his work upon "Democracy in America" he uses the striking simile, in describing the willingness and insistence of the American people in putting fetters upon their own action, thus: "It was a wild horse, biting and bridling itself, and submitting to an owner and master."

That is the idea that underlies this partition of powers between our Federal and the State Governments. That is the secret of the power of the American Government, which, after all criticisms, is the most beneficent and progressive government in the world.

Daniel Webster is reported to have said once to Lord Ashburton: "We have not copied from Greece or Italy; we have copied from the Creator, and our system is the solar system. Jupiter has its own orbit. Saturn has its own orbit. The Earth has its, and the Moon its. Yet the Sun holds them each in its own orbit while coursing majestically in the greater." *Discussion of Mr. Venable's Paper, Report of American Bar Association, Vol. 8, 14.*

Mr. Taft thus speaks of the distribution of the States and Federal powers:

The plan of Washington and his associates was to create a nation to consist of a central government and state governments. The central government was to have the power over foreign relations without interference by the states, complete power over war and peace, independent power to tax and raise money, and the absolute power over commerce, foreign and national. The states retained the wide field of local government. To this balance of authority is due the permanence of our Republic. An attempt to govern from Washington the home affairs of the people in forty-eight different states by acts of Congress and executive order would have severed the union into its parts. An attempt to give the national government to brush the doorsteps of the people of a state in parochial matters and in a local atmosphere which must be breathed in order to be understood, would have created a dissatisfaction and a fatal gnawing at the bond between the states. Confederations like ours have usually gone to destruction either through the expansion of the national authority into an arbitrary and tactless exercise of power, or through the paralyzing of needed national strength by the encroachment of the constituent states. Our Constitution has maintained its balance, and that is why we are stronger to-day than we ever were in our history. *The Constitutional Review, Vol. I, 68.*



## State and Federal Governments Dependent Each on the Other

Mr. Madison thus states the relations :

The State government will have the advantage of the Federal government, whether we compare them in respect to the immediate dependence of the one on the other; to the weight of personal influence which each side will possess; to the powers respectively vested in them; to the predilection and probate support of the people; to the disposition and faculty of resisting and frustrating the measures of each other.

The State governments may be regarded as constituent and essential parts of the Federal government; whilst the latter is nowise essential to the operation or organization of the former. Without the intervention of the State legislatures, the President of the United States can not be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it. The Senate will be elected absolutely and exclusively by the State legislatures. Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State legislatures. Thus, each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them. On the other side, the component parts of the State governments will in no instance be indebted for their appointment to the direct agency of the Federal government, and very little, if at all, to the local influence of its members. *Madison, in The Federalist, Vol. I, Number XLV.*

The powers delegated by the proposed Constitution to the Federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The operations of the Federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy another advantage over the federal government. The more adequate, indeed, the Federal powers may be rendered to the national defense, the less frequent will be those scenes of danger which might favor their ascendancy over the governments of the particular States.

If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS. *Madison, in The Federalist, Vol. I, Number XLV.*

The Federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. Truth, no less than decency, requires that the event in every case should be supported to depend on the sentiments and sanction of their common constituents. *Madison in The Federalist, Vol. I, Number XLVI.*

It has been already proved that the members of the federal will be more dependent on the members of the State governments, than the latter will be on the former. It has happened also, that the prepossessions of the people, on whom both will depend, will be more on the side of the State governments, than of the Federal government. So far as the disposition of each towards the other may be influenced by these causes, the State governments must clearly have the advantage. But in a distinct and very important point of view, the advantage will lie on the same side. The prepossessions, which the members themselves will carry into the Federal government, will generally be favorable to the States; whilst it will rarely happen, that the members of the State governments will carry into the councils a bias in favor of the general government. A local spirit will infallibly prevail much more in the members of Congress, than a national spirit will prevail in the legislatures of the particular States. Every one knows that a great proportion of the errors committed by the State legislatures proceeds from the disposition of the members to sacrifice the comprehensive and permanent interest of the State to the particular and separate views of the counties or districts in which they reside. *Madison in The Federalist, Vol. I, Number XLVI.*

The only refuge left for those who prophesy the downfall of the State governments is the visionary supposition that the Federal government may previously accumulate a military force for the projects of ambition. *Madison in The Federalist, Vol. I, Number XLVI.*

The powers proposed to be lodged in the Federal government are as little formidable to those reserved to the individual States, as they are indispensably necessary to accomplish the purposes of the Union; and that all those alarms which have been sounded, of a meditated and consequential annihilation of the State governments, must, on the most favorable interpretation, be ascribed to the chimerical fears of the authors of them. *Madison in The Federalist, Vol. I, Number XLVI.*

## Actions Against United States Government

It was held in *Arrendo's case*, 6 Pet. 711, that, by consenting to be sued, the United States had submitted to judicial action, and considered the suit as of a purely judicial character, which the courts were bound to decide as between man and man litigating the same subject-matter; and that, in thus deciding, the courts were restricted within the limits, and governed by the rules Congress had prescribed. *13 How. 257.*

The United States, of course, is not suable, except with its consent. This is an attribute of sovereignty. It may, however, sue in its own, or State Courts. *11½ U. S. 538; 162 U. S. 399; Cooley Const. 133; 106 U. S. 196.*

Judge Story, in his work on Constitutional law, says:

Mr. Tucker distinguished the word "cases" used in the one clause and the word "controversies" used in another. The former he deems to include all suits, criminal as well as civil; the latter as including such only as are of a civil nature. As last applied, controversies "seem," says he, "particularly appropriated to such disputes as might arise between the United States and any one or more States respecting territorial or fiscal matters, or between the United States and their debtors, contractors, and agents. This construction is confined by the application of the word in the ensuing clauses, where it evidently refers to dispute of a civil nature only, such, for example, as may arise between two or more States, or between citizens of different States, or between a State and the citizens of another State," etc. *1 Tucker's Black. Comm. App. 420, 421.* Mr. Justice Iredell, in his opinion in *Chisholm v. Georgia*, 2 Dall. R. 419, 431, 432, gives the same construction to the word "controversies," confining it to such as are of a civil nature *Story on the Constitution, Vol. V, p. 473, note.*

It may be asked, then, whether the citizens of the United States are wholly destitute of remedy, in case the national government should invade their rights, either by private injustice and injuries, or by public oppression? To this it may be answered, that in the general sense, there is a remedy in both cases. In regard to public oppressions, the whole structure of the government is so organized as to afford the means of redress, by enabling the people to remove public functionaries who abuse their trust, and to substitute others more faithful and more honest in their stead. If the oppression be in the exercise of powers clearly constitutional, and the people refuse to interfere in this manner, then, indeed, the party must submit to the wrong, as beyond the reach of all human power; for how can the people themselves, in their collective capacity, be compelled to do justice and to vindicate the rights of those who are subjected to their sovereign control? If the oppression be in the exercise of unconstitutional powers, then the functionaries who wield them are amenable for their injurious acts to the judicial tribunals of the country, at the suit of the oppressed. *Story on the Constitution, Vol. V, p. 475, § 1676.*

Congress have never yet acted upon the subject so as to give judicial redress for any non-fulfilment of contracts by the national government. Cases of the most cruel hardship and intolerable delay have already oc-

curred, in which meritorious creditors have been reduced to grievous suffering, and sometimes to absolute ruin, by the tardiness of a justice which has been yielded only after the humble supplications of many years before the legislature. One can scarcely refrain from uniting in the suggestion of a learned commentator, that in this regard the constitutions, both of the National and State governments, stand in need of some reform to quicken the legislative action in the administration of justice; and that some mode ought to be provided by which a pecuniary right against the State or against the United States might be ascertained and established by the judicial sentence of the same court; and when so ascertained and established, the payment might be enforced from the national treasury by an absolute appropriation. *Story on the Constitution. Vol. V, p. 477, § 1678.*

### United States As a Party to Actions

The United States, being a sovereign and independent nation, is not liable to be made defendant in any suit or proceeding without its own consent, either in one of its own courts or in the courts of a state. But it may, as plaintiff, institute proceedings against an individual or a state in any proper court. *Black on Constitutional Law, 142.*

### Nature of the American Union

Mr. Black thus speaks of the Union :

The United States of America is a nation, possessing the character and attributes of sovereignty and independence.

Politically speaking, the United States is a union of separate commonwealths, called "states." Territorially it includes:

- (a) The states.
- (b) The territories.
- (c) The District of Columbia.

Amendments proposed in either method must be ratified by the three-fourths of the states; and this may be done in either of two ways, according as one or the other mode may be proposed by Congress, viz.:

(a) By the legislatures of the states, acting as the representatives of the people.

(b) By conventions held in each state for the purpose.

Fifteen amendments to the Federal constitution have thus far been adopted. *Black on Constitutional Law, 42.*

### "To Form a More Perfect Union"

In a letter to Congress by Washington, written by the unanimous order of the Convention, it is said:

"In all our deliberations on this subject we kept constantly in our view that which appears to us the greatest interest of every true American, the consolidation of our Union—in which is involved our prosperity, felicity, safety, perhaps our national existence."

It is clear that it was the intention of the Constitution that the former union should continue more perfect, more consolidated, and be perpetuated. *Foster on the Constitution, Vol. 1, p. 96.*



## The Union—Who Are Its Real Friends?

Mr. Madison thus answers the question :

Not those who charge others with not being its friends, whilst their own conduct is wantonly multiplying its enemies.

Not those who favor measures which, by pampering the spirit of speculation within and without the Government, disgust the best friends of the Union.

Not those who promote unnecessary accumulations of the debt of the Union, instead of the best means of discharging it as fast as possible, thereby increasing the causes of corruption in the Government, and the pretext for new taxes under its authority; the former undermining the confidence, the latter alienating the affection, of the people.

Not those who study, by arbitrary interpretations and insidious precedents, to pervert the limited Government of the Union into a government of unlimited discretion, contrary to the will and subversive of the authority of the people.

Not those who avow or betray principles of monarchy and aristocracy, in opposition to the republican principles of the Union and the republican spirit of the people, or who espouse a system of measures more accommodated to the depraved examples of those hereditary forms than to the true genius of our own.

Not those, in a word, who would force on the people the melancholy duty of choosing between the loss of the Union and the loss of what the Union was meant to secure.

*The real FRIENDS of the Union are those* who are friends to the authority of the people, the sole foundation on which the Union rests;

Who are friends to liberty, the great end for which the Union was formed;

Who are friends to the limited and republican system of government, the means provided by that authority for the attainment of that end;

Who are enemies to every public measure that might smooth the way to hereditary government, for resisting the tyrannies of which the Union was first planned, and for more effectually excluding which it was put into its present form;

Who, considering a public debt as injurious to the interests of the people and baneful to the virtue of the Government, are enemies to every contrivance for *unnecessary* increasing its amount, or protracting its duration, or extending its influence.

In a word, those are the real friends of the Union who are friends to that republican policy throughout, which is the only *cement* for the union of a republican people, in opposition to a spirit of usurpation and monarchy, which is the menstruum most capable of dissolving it.

*4 Writings of Madison, pp. 480-481.*

## Our Relations to and With Foreign Nations

Washington, in his Farewell Address, thus advised us :

Observe good faith and justice towards all Nations; cultivate peace and harmony with all. Religion and Morality enjoin this conduct; and can it be, that good policy does not equally enjoin it? It will be worthy

of a free, enlightened, and, at no distant period, a great Nation, to give to mankind the magnanimous and too novel example of a people always guided by an exalted justice and benevolence. Who can doubt, that, in the course of time and things, the fruits of such a plan would richly repay any temporary advantages which might be lost by a steady adherence to it? *Writings of Washington, Vol. 12, 228.*

The Nation, which indulges towards another an habitual hatred, or an habitual fondness, is in some degree a slave. It is a slave to its animosity or to its affection, either of which is sufficient to lead it astray from its duty and its interest. Antipathy in one nation against another disposes each more readily to offer insult and injury, to lay hold of slight causes of umbrage, and to be haughty and intractable, when accidental or trifling occasions of dispute occur. Hence frequent collisions, obstinate, envenomed, and bloody contests. The Nation, prompted by ill-will and resentment, sometimes impels to war the Government, contrary to the best calculations of policy. *Writings of Washington, Vol. 12, 229.*

Against the insidious wiles of foreign influence (I conjure you to believe me, fellow-citizens,) the jealousy of a free people ought to be *constantly* awake; since history and experience prove that foreign influence is one of the most baneful foes of Republican Government. But that jealousy, to be useful, must be impartial; else it becomes the instrument of the very influence to be avoided, instead of a defence against it. Excessive partiality for one foreign nation, and excessive dislike of another, cause those whom they actuate to see danger on one side, and serve to veil and even second the arts of influence on the other. *Writings of Washington, Vol. 12, 230-1.*

The great rule of conduct for us, in regard to foreign nations, is, in extending our commercial relations, to have with them as little *political* connection as possible. So far as we have already formed engagements, let them be fulfilled with perfect good faith. Here let us stop.

Europe has a set of primary interests, which to us have none, or very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves, by artificial ties, in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or enmities.

Our detached and distant situation invites and enables us to pursue a different course. *Writings of Washington, Vol. 12, 231.*

Why, by interweaving our destiny with that of any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalry, interest, humor, or caprice?

It is our true policy to steer clear of permanent alliances with any portion of the foreign world; so far, I mean, as we are now at liberty to do it; for let me not be understood as capable of patronizing infidelity to existing engagements. I hold the maxim no less applicable to public than to private affairs, that honesty is always the best policy. I repeat it, therefore, let those engagements be observed in their genuine sense. But, in my opinion, it is unnecessary and would be unwise to extend them. *Writings of Washington, Vol. 12, 231-2.*

It is folly in one nation to look for disinterested favors from another; that it must pay with a portion of its independence for whatever it may accept under that character; that, by such acceptance, it may place itself in the condition of having given equivalents for nominal favors, and yet of being reproached with ingratitude for not giving more. There can be no greater error than to expect or calculate upon real favors from nation to nation. It is an illusion, which experience must cure, which a just pride ought to discard. *Writings of Washington, Vol. 12, 232-3.*

### The Union—Preserve It

Washington, in his Farewell Address, thus imposes this duty upon us:

The unity of Government, which constitutes you one people, is also dear to you. It is justly so; for it is a main pillar in the edifice of your real independence, the support of your tranquillity at home, your peace abroad; of your safety; of your prosperity; of that very Liberty, which you so highly prize. But as it is easy to foresee, that, from different causes and from different quarters, much pains will be taken, many artifices employed, to weaken in your minds the conviction of this truth; as this is the point in your political fortress against which the batteries of internal and external enemies will be most constantly and actively (though often covertly and insidiously) directed, it is of infinite moment, that you should properly estimate the immense value of your national Union to your collective and individual happiness; that you should cherish a cordial, habitual, and immovable attachment to it; accustoming yourselves to think and speak of it as of the Palladium of your political safety and prosperity; watching for its preservation with jealous anxiety; discountenancing whatever may suggest even a suspicion, that it can in any event be abandoned; and indignantly frowning upon the first dawning of every attempt to alienate any portion of our country from the rest, or to enfeeble the sacred ties which now link together the various parts. *Writings of Washington, Vol. 12, 218.*

In contemplating the causes, which may disturb our Union, it occurs as matter of serious concern, that any ground should have been furnished for characterizing parties by *Geographical* discriminations, *Northern* and *Southern*, *Atlantic* and *Western*; whence designing men may endeavor to excite a belief, that there is a real difference of local interests and views. One of the expedients of party to acquire influence, within particular districts, is to misrepresent the opinions and aims of other districts.<sup>1</sup> *Writings of Washington, Vol. 12, 221.*

### The United States a Nation

The United States, considered as a unit, possesses all the characteristics and attributes, and is entitled to the designation, of a nation. It is composed of one people, united by language, customs, laws, and

<sup>1</sup>The above was really prophetic of the war between the states. It was really sectional strife, caused from a division of parties geographically, that

brought on this. The Missouri compromise led to a geographical division of parties.

institutions, as well as by birth on the soil or adoption into the family of native citizens. It has the character of an organized jural society, governed, in all things concerning the whole people, by one system of law and one constitution. It occupies a distinct portion of the earth's surface. It acknowledges no political superior. It has also an inherent and absolute power of legislation. *Black on Constitutional Laws, 17.*

## History of the Union

Judge Cooley thus states the history :

Besides the tie uniting the several colonies through the Crown of Great Britain, there had always been a strong tendency to a more intimate and voluntary union, whenever circumstances of danger threatened them; and this tendency led to the New England Confederacy of 1643; to the temporary Congress of 1690; to the plan of union agreed upon in Convention of 1754, but rejected by the Colonies as well as the Crown, to the Stamp Act Congress of 1765, and finally to the Continental Congress of 1774. When the difficulties with Great Britain culminated in actual war, the Congress of 1775 assumed to itself those powers of external control which before had been conceded to the Crown or to the President, together with such other powers of sovereignty as it seemed essential a general government should exercise, and thus became the national government of the United Colonies. By this body, war was conducted, independence declared, treaties formed, and admiralty jurisdiction exercised. *Cooley on Constitutional Limitations.*

The Constitution was ratified by conventions of delegates chosen by the people in eleven of the States, before the new government was organized under it; and the remaining two, North Carolina and Rhode Island, by their refusal to accept, and by the action of others in proceeding separately, were excluded altogether from that national jurisdiction which before had embraced them. This exclusion was not warranted by anything contained in the Articles of Confederation, which purported to be the articles of "perpetual union;" and the action of the eleven States in making radical revision of the Constitution, and excluding their associates for refusal to assent, was really revolutionary<sup>1</sup> in character, and not to be defended on the same ground of necessity on which all revolutionary action is justified, and which in this case was the absolute need, fully demonstrated by experience, of a more efficient general government. *Cooley on Constitutional Limitations, 9.*

<sup>1</sup>A President of the United States, Mr. Van Buren, has said that the adoption of the Constitution which excluded two States was an heroic though lawless act. *Political Parties, p. 50.* Mr. Madison treats of it in some length in *The Federalist, No. 43.* It

is perfectly certain that the Articles of Confederation were dissolved or changed illegally by a practical revolution. It required the consent of all the States to change the Articles and the consent of two was not obtained.



*Copy of*  
**CONSTITUTION OF THE UNITED STATES**

WE, THE PEOPLE OF THE UNITED STATES, IN ORDER TO FORM A MORE PERFECT UNION, ESTABLISH JUSTICE, INSURE DOMESTIC TRANQUILLITY, PROVIDE FOR THE COMMON DEFENSE, PROMOTE THE GENERAL WELFARE, AND SECURE THE BLESSINGS OF LIBERTY TO OURSELVES AND OUR POSTERITY, DO ORDAIN AND ESTABLISH THIS CONSTITUTION FOR THE UNITED STATES OF AMERICA.

ARTICLE I

SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.<sup>1</sup>

The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative, and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SECTION 3. The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote. (The above is changed by the seventeenth amendment.)

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated

<sup>1</sup>The foregoing clause is amended by the 14th Amendment, 2nd section.

at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

The vice-president of the United States shall be president of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their officers, and also a president pro tempore, in the absence of the vice-president, or when he shall exercise the office of president of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside: and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION 4. The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5. Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION 6. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of

the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.

SECTION 7. All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the president of the United States; if he approve he shall sign it, but if not, he shall return it, with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8. The Congress shall have power: To lay and collect taxes, duties, imposts and excise, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right of their respective writings and discoveries;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress:

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings:—And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

SECTION 9. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex post facto law shall be passed.

No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No preference shall be given to any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.



No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

SECTION 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money, or bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts, or grant any title of nobility.

No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No state shall without the consent of Congress, lay any duty of tonnage, keep troops, or ships or car in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or insuch imminent danger as will not admit of delay.

## ARTICLE II

SECTION 1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected, as follows:

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress: but no senator or representative, or person holding an office of trust or profit under the United States shall be appointed an elector.<sup>1</sup>

The Congress may determine the time of choosing the electors and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural-born citizen, or a citizen of the United States, at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

The president shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the

<sup>1</sup>This clause has been superseded by the 12th Amendment.

period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation—"I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will to the best of my ability, preserve, protect and defend the constitution of the United States."

SECTION 2. The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4. The president, vice-president and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

### ARTICLE III

SECTION 1. The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office.

SECTION 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority—to all cases affecting ambassadors, other public ministers and consuls,—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crime shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attained.

#### ARTICLE IV

SECTION 1. Full faith and credit shall be given to each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SECTION 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION 3. New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdic-

tion of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

*Section 4.* The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature can not be convened) against domestic violence.

#### ARTICLE V

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

#### ARTICLE VI

All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution, as under the confederation.

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

#### ARTICLE VII

The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same.



DONE in convention by the unanimous consent of the states present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven and of the independence of the United States of America the twelfth. IN WITNESS whereof we have hereunto subscribed our names,

GEO. WASHINGTON,  
Presidt. and Deputy from Virginia.

*New Hampshire*

JOHN LANGDON  
NICHOLAS GILMAN

*Massachusetts*

NATHANIEL GORHAM  
RUFUS KING

*Connecticut*

WM. SAML. JOHNSON  
ROGER SHERMAN

*New York*

ALEXANDER HAMILTON

*New Jersey*

WIL. LIVINGSTON  
DAVID BREARLEY  
WM. PATERSON  
JONA. DAYTON

*Pennsylvania*

B. FRANKLIN  
ROBT. MORRIS  
THOS. FITZSIMONS  
JAMES WILSON  
THOMAS MIFFLIN  
GEO. CLYMER  
JARED INGERSOLL  
GOUV. MORRIS

Attest:

*Delaware*

GEO. READ  
JOHN DICKINSON  
JACO. BROOM  
GUNNING BEDFORD, JR  
RICHARD BASSETT

*Maryland*

JAMES M'HENRY  
DANL. CARROLL  
DAN. OF ST. THOS. JENIFER

*Virginia*

JOHN BLAIR  
JAMES MADISON, JR.

*North Carolina*

WM. BLOUNT  
HU. WILLIAMSON  
RICH'D DOBBS SPAIGHT

*South Carolina*

J. RUTLEDGE  
CHAS. COTESWORTH PINCK-  
NEY  
PIERCE BUTLER

*Georgia*

WILLIAM FEW  
ABR. BALDWIN

WILLIAM JACKSON, Secretary.

## Articles in Addition to, and Amendment of, the Constitution of the United States of America

PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF  
THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF  
THE ORIGINAL CONSTITUTION.

### ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

### ARTICLE II

A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

### ARTICLE III

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

### ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The following ten amendments to the constitution of the United States were proposed to the legislatures of the several states by the first Congress on the 25th day of September, 1789.

## ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

## ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## ARTICLE IX

The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

## ARTICLE X

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

ARTICLE XI<sup>1</sup>

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

ARTICLE XII<sup>2</sup>

NOTE.—This amendment was called for on account of the election of 1800, when Jefferson and Burr were tied for first place. Burr was put forward as a candidate for Vice-President only, but, under the Constitution, he came near being elected President.

The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in district ballots the person voted for as vice-president, and they shall make district lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate;—The president of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as president, the House of Representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state

<sup>1</sup>The 11th Amendment of the constitution of the United States was proposed to the legislatures of the several states by the third Congress on September 5, 1794; and declared in a message from the President to Congress

January 8, 1798, to have been ratified by the legislatures of three-fourths of the states.

<sup>2</sup>Twelfth Amendment proposed December 12, 1803, and declared to have been ratified September 25, 1804.

having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States.

#### ARTICLE XIII<sup>1</sup>

NOTE.—All amendments prior to the 12th was to decentralize power, to weaken the power of the Union and strengthen that of the States and the people. All subsequent ones, except the 17th, have been to centralize power in the United States and to weaken that of the States and the people thereof. It is high time for the pendulum to begin to swing back, if the dual form of government is to be longer preserved.

*Section 1.* Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

*Section 2.* Congress shall have power to enforce this article by appropriate legislation.

#### ARTICLE XIV<sup>2</sup>

*Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Section 2.* Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

<sup>1</sup>The 13th Amendment proposed February 1, 1865, and declared to have been ratified December 18, 1865.

<sup>2</sup>The 14th Amendment proposed June 16, 1866, and declared to have been ratified July 21, 1869.



*Section 3.* No person shall be a senator or representative in Congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

*Section 4.* The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

#### ARTICLE XV<sup>1</sup>

*Section 1.* The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

*Section 2.* The Congress shall have power to enforce this article by appropriate legislation.

#### ARTICLE XVI<sup>2</sup>

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

#### ARTICLE XVII<sup>3</sup>

The Senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: provided, that the legislature of any state may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be construed as to affect the election or term of any senator chosen before it becomes valid as part of the constitution.

<sup>1</sup>The 15th Amendment proposed February 27, 1869, and declared to have been ratified March 30, 1870.

<sup>2</sup>The 16th Amendment proposed July 31, 1909, and declared ratified February 25, 1913.

<sup>3</sup>The 17th Amendment proposed May 15, 1912, and declared ratified May 31, 1913. This amendment proposed in lieu of the original first paragraph of section 3 of article I, and in lieu of so much of paragraph 2 of the same section as related to the filling of vacancies.

## ARTICLE XVIII

*Section 1.* After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

*Section 2.* The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

*Section 3.* This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of the several states, as provided in the constitution, within seven years from the date of the submission hereof to the state by the Congress.

NOTE:—The 19th amendment will probably be adopted before this book is out of the press.

**The Constitution Defined**

The Supreme Court has thus defined the Constitution:

What is a constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is fixed and certain; it contains the permanent will of the people, and it is the supreme law of the land; it is paramount to the will of the people, and it is the supreme law of the land; it is paramount to the will of the legislature, and can be revoked and altered only by the authority that made it. The life-giving principle and the death-dealing stroke must proceed from the same hand \* \* \* In short, the Constitution is the sum of the political system, around which the legislative, executive, and judicial bodies revolve. Whatever may be the case in other countries, yet in this there can be no doubt that every act of the legislature repugnant to the Constitution is absolutely void. *Vanhorne's Lessee v. Dorrance*, 2 *Dall.* 308; *Miller's Const.* Note p. 71.

The constitution of a state is the fundamental law of the state, containing the principles upon which the government is founded, and regulating the division of the sovereign powers, directing to what persons each of those powers is to be confided and the manner in which it is to be exercised. *Black on Constitutional Law*, 1-2.

In American law, the constitution is the organic and fundamental act adopted by the people of the Union or of a particular state as the supreme and paramount law and the basis and regulating principle of the government. *Black on Constitutional Law*, 2.

"Constitutional" means conforming to the constitution. A statute or ordinance which is inconsistent with the constitution, or in conflict with any of its provisions, is said to be "unconstitutional." *Black on Constitutional Law*, 4.

Judge Cooley thus defines American Constitutions:

A constitution is sometimes defined as the fundamental law of a State, containing the principles upon which the government is founded, regulating the division of the sovereign powers, and directing to what

persons each of these powers is to be confided, and the manner in which it is to be exercised. Perhaps an equally complete and accurate definition would be, that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised. *Cooley on Constitutional Limitations*, 4.

In American constitutional law, the word *constitution* is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union, or of any one of the States, as the absolute rule of action and decision for all departments and officers of the government, in respect to all the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or regulation of any such department or officer, or even of the people themselves, will be altogether void. *Cooley on Constitutional Limitations*, 5.

In Great Britain constitutional questions are for the most part to be discussed before the people or the Parliament, since the declared will of the Parliament is the final law; but in America, after a constitutional question has been passed upon by the legislature, there is generally a right of appeal to the courts when it is attempted to put the will of the legislature in force. For the will of the people, as declared in the Constitution, is the final law; and the will of the legislature is law only when it is in harmony with, or at least is not opposed to, that controlling instrument which governs the legislative body equally with the private citizen. *Cooley on Constitutional Limitations*, 6.

### **“Constitutional Law” Defined**

Constitutional law is that department of the science of law which treats of the nature of constitutions, their establishment, construction, and interpretation, and of the validity of legal enactments as tested by the criterion of conformity to the fundamental law. *Black on Constitutional Law*, 1.

### **The Constitution as a Grant of Powers**

The federal constitution contains a grant of powers to the government which it creates, but is not exhaustive of the powers which the people who maintain it might confer upon that government. *Black on Constitutional Law*, 31.

### **The Constitution as the Supreme Law**

The constitution of the United States is the supreme law of the land, and is equally binding upon the federal government and the states and all their officers and people. Any and all enactments which may be found to be in conflict with the constitution are null and void. *Black on Constitutional Law*, 32.

### **The Constitution and Treaty Laws**

It is elementary that a State statute, in conflict with a law of Congress upon a subject about which Congress may constitutionally legislate, is void. So, too, a State statute is void if it relates to a subject which is vested exclusively in Congress by the Constitution. A treaty,

although its obligations in regard to the other party to it remain in force, is, as a part of the supreme law of the land, subject to be revoked or modified as to its municipal operation, by act of Congress, like any other law. *Miller's Const. pp. 643-4.*

### Differences Between Constitution and Statutes

A constitution differs from a statute or act of a legislature in three important particulars:

(1) It is enacted by the whole people who are to be governed by it, instead of being enacted by their representatives sitting in a congress or legislature.

(2) A constitution can be abrogated, or modified only by the power which created it, namely, the people; whereas a statute may be repealed or changed by the legislature.<sup>1</sup>

(3) The provisions of a constitution refer to the fundamental principles of government, or the establishment and guaranty of liberties, instead of being designed merely to regulate the conduct of individuals among themselves. But the tendency towards amplification, in modern constitutions, derogates from the provision of this last distinction. *Black on Constitutional Laws, 4.*

### Origin of the Constitution

Mr. Madison thus states the origin of the Convention that created it in answer to a personal inquiry :

I am not sure that I understand your allusions to the origin of the Convention of 1787. If I do, you have overlooked steps antecedent to the interposition of the old Congress. That Convention grew out of the Convention at Annapolis, in August, 1786, recommended by Virginia in the preceding winter. It had for its objects certain provisions only, relating to commerce and revenue. The Deputies who met, inferring from an interchange of information as to the state of the public mind that it had made a great advance, subsequent even to the act of Virginia, towards maturity for a thorough reform of the federal system, took the decisive step of recommending a Convention, with adequate powers for the purpose. The Legislature of Virginia, being the first that assembled, set the example of compliance, and endeavored to strengthen it by putting General Washington at the head of the Deputation.

I can not but highly approve the industry with which you have searched for a key to the sense of the Constitution, where alone the true one can be found, in the proceedings of the Convention, the contemporary expositions, and, above all, in the ratifying conventions of the States. If the instrument be interpreted by criticisms which lose sight of the intention of the parties to it, in the fascinating pursuit of objects of public advantage or convenience, the purest motives can be no security against innovations materially changing the features of the government. *3 Writings of Madison, pp. 521-522.*

<sup>1</sup>In this sense England can not be truly said to have a constitution. The will of Parliament is the only perma-

nency of any of her constitutional provisions, no matter how venerable or sacred.



Mr. Bryce thus describes the origin of the American Constitution :

In the reign of George III troubles arose between England and her North American colonists, there existed along the eastern coast of the Atlantic thirteen little communities, the largest of which (Virginia) had not much more than half a million people, and the total population of which did not reach three millions. All owed allegiance to the British Crown, all, except Connecticut and Rhode Island, received their governors from the Crown; in all, causes were carried by appeal from the colonial courts to the English Privy Council. Acts of the British Parliament ran there as they now run in the British colonies, whenever expressed to have the effect, and could over-rule such laws as the colonies might make. *Bryce's American Commonwealth, Vol. I, 16.*

When the oppressive measures of the home government roused the colonies, they naturally sought to organize their resistance in common. Singly they would have been an easy prey, for it was long doubtful whether even in combination they could make head against regular armies. A congress of delegates from nine colonies held in New York in 1765 was followed by another at Philadelphia in 1774, at which twelve were represented, which called itself Continental (for the name American had not yet become established), and spoke in the name of the "good people of these colonies," the first assertion of a sort of national unity among the English of America. This congress, in which from 1775 onwards all the colonies were represented, was a merely revolutionary body, called into existence by the war with the mother country. But in 1776 it gave itself a new legal character by framing the "Articles of Confederation and Perpetual Union," whereby the thirteen States (as they now called themselves) entered into a "firm league of friendship" with each other, offensive and defensive, while declaring that "each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation, expressly delegated to the United States in Congress assembled." *Bryce's American Commonwealth, Vol. I, 16-17.*

The Convention thus summoned met at Philadelphia on the 14th of May, 1787, became competent to proceed to business on May 25th, when seven States were represented, and chose George Washington to preside. Delegates attended from every State but Rhode Island, and these delegates, unlike those usually sent to Congress, were the leading men of the country, influential in their several States, and now filled with a sense of the need for comprehensive reforms. The instruction they had received limited their authority to the revision of the articles of Confederation and the proposing to Congress and the State legislatures such improvements as were required therein. But with admirable boldness, boldness doubly admirable in Englishmen and lawyers, and to prepare a wholly new Constitution, to be considered and ratified neither by Congress nor by the State legislatures, but by the peoples of the several States. *Bryce's American Commonwealth, Vol. I, 19.*

The debates were secret, and fortunately so, for criticism from without might have imperilled a work which seemed repeatedly on the point of breaking down, so great were the difficulties encountered from

the divergent sentiments and interests of different parts of the country, as well as of the larger and smaller States. The records of the Convention were left in the hands of Washington, who in 1796 deposited them in the State Department. In 1819 they were published along with the notes of the discussions kept by James Madison (afterwards twice President), who had proved himself one of the ablest and most useful members of the body. From these official records and notes the history of the Convention has been written, and may be found in the instructive volumes of Mr. G. T. Curtis and of Mr. George Bancroft, now the patriarch of American history. *Bryce's American Commonwealth, Vol. I, 20.*

There was a struggle over the adoption of the Constitution, a struggle which gave birth to the two great parties that for many years divided the American people. The chief source of hostility was the belief that a strong central government endangered both the rights of the States and the liberties of the individual citizen. Freedom, it was declared, would perish, freedom rescued from George III would perish at the hands of her own children. Consolidation (for the word centralization had not yet been invented) would extinguish the State governments and the local institutions they protected. The feeling was very bitter, and in some States, notably in Massachusetts and New York, the majorities were dangerously narrow. *Bryce's American Commonwealth, Vol. I, 23.*

### **The Constitution An Outgrowth of Old Institutions and Not of New Devices**

“Nature is wiser than the wisest of men.” The best men can hope to do is to study her laws and attempt to follow her examples. No set or generation of men can hope to learn all of her laws, or to follow all of her examples. One set or generation learns a few of her laws and how to apply them, and another a few more, and thus progress and Civilization goes on. Our forefathers, in making our Constitution, did not attempt something wholly new. They were very, very wise men, as wise as any then living. They not only formulated the laws of Nature which they had learned and applied in constituting a government, but they applied those that their predecessors had learned and applied successfully. They avoided the errors of their predecessors in attempting to create and to operate a government, which had to move contrary to the laws of Nature. They erred, in some cases of course, by following their ancestors, the greatest of which was in their attempt to legalize slavery. This mistake came near destroying the government. No government or other body can long continue to move contrary to the laws of Nature. Her laws are supreme and in the end all others must conform thereto.

Another mistake was in the mode of selecting a president. Several attempts have been made to better this provision, but it is not yet perfected. In practice, however, the theory is not attempted to be carried out. The selection is really made by political conventions. The most that the election does is to determine which of those nominated by the conventions shall be selected. Mr. Wilson cites this as an instance of amending the Constitution by custom or usage. It is either amended or ignored. The best and most enduring parts of our Constitution are those of old institutions, which have been proven to work well in other governments, and not those designedly intended as new and to attain a desired and specified end. A government formed, as ours was, by a combination of principles which had been tested and proven by time, is much more successful than one made up wholly of new theories and experiments. Emperors have supposed our Constitution to be of the latter kind, when in truth it is of the former. Mr. Bryce has well pointed out this error.

The very best and most enduring parts of our Federal Constitution were taken from European Constitutions and from the State Constitutions, which had been tested by our forefathers. Mr. Bryce has made the following remarks on the subject :

Some one has said that the American Government and Constitution are based on the theology of Calvin and the philosophy of Hobbes. This is at least true, that there is a hearty Puritanism in the view of human nature which pervades the instrument of 1787. It is the work of men who believed in original sin, and were resolved to leave open for trespassers no door which they could possibly shut. Compare this spirit with the enthusiastic optimism of the Frenchmen of 1789. It is not merely a difference of race temperaments; it is a difference of fundamental ideas.

With the spirit of Puritanism there is blent a double portion of the spirit of legalism. Not only is there no reliance on ethical forces to help the government to work: there is an elaborate machinery of law to preserve the equilibrium of each of its organs. The aim of the Constitution seems to be not so much to attain great common ends by securing a good government as to avert the evils which will flow, not merely from a bad government, but from any government strong enough to threaten the pre-existing communities or the individual citizen.

The spirit of 1787 was an English spirit, and therefore a conservative spirit, tinged, no doubt, by the hatred to tyranny developed in the revolutionary struggle, tinged also by the nascent dislike to inequality, but in the main an English spirit, which desired to walk in the old paths of precedent, which thought of government as a means of main-

taining order and securing to every one his rights, rather than as a great ideal power, capable of guiding and developing a nation's life. And thus, though the Constitution of 1789 represented a great advance on the still oligarchic system of contemporary England, it was yet, if we regard simply its legal provisions, the least democracy of democracies. *Bryce's American Commonwealth, Vol. I, 299-300.*

### Prototypes of the Constitution

The Constitution of the United States is not the first written constitution of a nation, although it is the first that has had a prolonged and successful duration. Articles of confederation in peace and war between different states were the natural outgrowth of treaties of alliances between small powers under constant dangers from an enemy too strong for any one of them alone. Such was the Achaian League, which lasted in Greece one hundred and thirty-four years, from the reign of Pyrrhus to the proconsulate of Mummius. At the outbreak of the Revolution, such confederations dragged out an impotent existence in Switzerland and the Netherlands. From the latter form of league were copied many of the defects in the instrument which the Constitution displaced. *Foster on the Constitution, Vol. 1, p. 27.*

### Objects and Purposes of the Constitution

The establishment of our Constitution was in fact, as Dr. Hill points out, "the first attempt in history to lay the foundations of government in the deep setting of human rights." It gave to government a human foundation instead of a merely dynamic foundation. For the unique contribution of the American Constitution to political philosophy was the conception of liberty as a strictly personal prerogative, as distinguished from something appertaining to the citizenry in the aggregate, or the concession of a monarch to the demands of its subjects. From this premise it must follow that the prime concern of our system of government is not the state, but the citizen.<sup>1</sup> The collective purpose of the people is to be accomplished through the state as their instrument. *The Constitutional Review, Vol. 1, 51.*

Let us never forget that our constitutions of government are solemn instruments, addressed to the common sense of the people, and designed to fix and perpetuate their rights and their liberties. They are not to be frittered away to please the demagogues of the day. They are not to be violated to gratify the ambition of political leaders. They are to speak in the same voice now and forever. They are of no man's private interpretation. They are ordained by the will of the people; and can be changed only by the sovereign demand of the people. *Story on the Constitution, Vol. V, p. 653-4, § 1908.*

<sup>1</sup>Herein our Constitutions differ from all others. It is a Constitution both of government and of liberty; whereas, others are of government only. With us liberty is the direct object to be attained and preserved, while the government is incidental as an agency to the end. With others, the government is the direct object and end to be attained and perpetuated;

whereas, liberty is incidental and must be accorded by the government, gratuitously if obtained. With us, human rights and liberties are everything, dynamic power little; with others, dynamic governmental power is everything and the rights and liberties of the people subjects of little importance.



Mr. Calhoun thus defined the objects and purposes of Constitutions :

Constitutions stand to governments, as laws do to individuals. As the object of laws is to regulate and restrain the actions of individuals, so as to prevent one from oppressing or doing violence to another, so in like manner, that of constitutions is to regulate and restrain the actions of governments, so that those who exercise its powers, shall not oppress or do violence to the rest of the community. Without laws, there would be universal anarchy and violence in the community; and, without constitutions, unlimited despotism and oppression. This is true, be the form of government what it may. If the government of one man or that of a few, would abuse its authority, if not restrained,—as is admitted,—there is no reason why that of the many would not do the same, if not also restrained. If, in a community of one hundred persons, forty-nine can not be trusted with unlimited power over fifty-one—on what principle can fifty-one be trusted with unlimited power over forty-nine? If, unrestrained, the one will abuse its powers, why will not the other also? Can the transfer of a single individual, from the side of the fifty-one to that of the forty-nine, have the magic effect of reversing the character of the two, and making that unsafe, which before was trust-worthy?

The truth is,—the Government of the uncontrolled numerical majority is but the *absolute and despotic form of popular governments.*<sup>1</sup> 6 *Calhoun's Works*, pp. 228-9.

Mr. Webster thus states the object of the Constitution :

It was, for certain purposes, to make us *one people*, though surely not for all purposes; and the extent to which it was desired and designed that the people of all the States should be one people, and the government over these people should be one government, is expressed in a document of the most authentic character, I mean the letter addressed to the Congress of the Confederation by the Convention which formed the Constitution. That letter, written on behalf of the Convention, and having the great name of Washington subscribed to it, says:

“The friends of our country have long seen and desired that the power of making war, peace, and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities, should be fully and effectually vested in the general government of the Union.”

We see here, then, that the object of this Constitution was to make the people of the United States one people, and to place them under one government, in regard to everything respecting their relation to foreign states and the aspect in which the nations of the world were to regard them. It was not an amalgamation of the whole people

<sup>1</sup>Nothing better has been said on the subject by any statesman or philosopher, as to fundamental distinction between Constitutions and statutes. In fact, it is all that need be said; it is truly *multum in parvo*. It is to be regretted that the distinction is not al-

ways observed. The modern trend of thought is to change the Constitution into statutes. If statutes are destroyed, anarchy is the result; if Constitutions are made statutes, despotism results.

under one government; not an extinguishment of the State sovereignties.<sup>1</sup> That would have been an extinction, not a union, of existing States. 2 *Webster's Works*, (7th ed.), p. 223-224.

### Development and Evolution of the Constitution

There have developed, during the last century, changes in the Constitution due to custom and usage, which would not be perceived by a mere reading of the instrument, or of text-books, or decisions construing it. These changes might be called amendments by custom and usage, which have gone unchallenged. One of these has been the mode of selecting the president and vice-president. Mr. Bryce thus numbers the others:

To expect any form of words, however weightily conceived, with whatever sanctions enacted, permanently to restrain the passions and interests of men is to expect the impossible. Beyond a certain point, you can not protect the people against themselves any more than you do, to use a familiar American expression, lift yourself from the ground by your own boot-straps. Laws sanctioned by the overwhelming physical power of despots, laws have failed to restrain those passions in ages of slavery and superstition. The world is not so much advanced that in this age laws, even the best and most venerable laws, will of themselves command obedience. Constitutions which in quiet times change gradually, peacefully, almost imperceptibly, must in times of revolution, be changed more boldly, some provisions being sacrificed for the sake of the rest, as mariners throw overboard part of the cargo in the storm in order to save the other part with the ship herself. To cling to the letter of the Constitution when the welfare of the country for whose sake the Constitution exists is at stake, would be to seek to preserve life at the cost of all that makes life worth living—*propter vitam vivendi perdere causas*.

Nevertheless the rigid Constitution of the United States has rendered, and renders now, inestimable services. It opposes obstacles to rash and hasty change. It secures time for deliberation. It forces the people to think seriously before they alter it or pardon a transgression of it. It makes legislatures and statesmen slow to overpass their legal powers, slow even to propose measures which the Constitution seems to disapprove. It tends to render the inevitable process of modification gradual and tentative, the result of admitted and growing necessities rather than of restless impatience. It altogether prevents some changes which a temporary majority may clamour for, but which will have ceased to be demanded before the barriers interposed by the Constitution have been overcome.

It does still more than this. It forms the mind and temper of the people. It trains them to habits of legality. It strengthens their con-

<sup>1</sup>The modern tendency of action if not of thought is to extinguish the States, as to any sovereign power and to make them agencies and parts only of the central government, as counties and cities are parts of the State.

If this continues, we will soon have no union of States but parts and parcels of one central government or nation as to all things, domestic as well as foreign, local as well as general.

servative instincts, their sense of the value of stability and permanence in political arrangements. It makes them feel that to comprehend their supreme instrument of government is a personal duty, incumbent on each one of them. It familiarizes them with, it attaches them by ties of pride and reverence to, those fundamental truths on which the Constitution is based.

These are enormous services to render to any free country, but above all to one which, more than any other, is governed not by the men of rank or wealth or special wisdom, but by public opinion, that is to say, by the ideas and feelings of the people at large. *Bryce's American Commonwealth, Vol. I, 396-7.*

### **The Opinion of Eminent Men as to the Constitution and Those Who Proposed It.**

Bancroft thus speaks of the subject and gives references:

On the proposition for another convention all the states answered, "No." Washington then put the question of agreeing to the constitution in its present form; and all the states present answered "Aye." The constitution was then ordered to be engrossed, and late on the evening of Saturday the house adjourned. Gilpin, 1595; Eliot, 553.

One morning Washington, in a desultory conversation with members of the convention before the chair was taken, observed how unhappy it would be, should any of them oppose the system when they returned to their states. (Luther Martin in *Maryland Journal* of 21 March, 1788.) On Monday, the seventeenth of September, Franklin made a last effort to win over the dissenting members. "Mr. President," said he, "several parts of this constitution I do not at present approve, but I am not sure I shall never approve them. It astonishes me to find this system approaching so near to perfection. I consent to this constitution because I expect no better, and because I am not sure that it is not the best. The opinions I have had of its errors I sacrifice to the public good.

"On the whole, sir, I can not help expressing a wish that every member of the convention, who may have objections to it, would with me on this occasion doubt a little of his own infallibility, and to manifest our unanimity, put his name to this instrument." Gilpin, 1597, 1598; Elliot, 554, 555. He then moved that the constitution be signed by the members; and he offered as the form of signature a simple testimony that the constitution had received "the unanimous consent of the states present." Gilpin, 1598; Elliot, 555. But this ample concession induced neither Mason, nor Gerry, nor Randolph to relent. *Bancroft on the History of the Constitution of the United States, 365.*

"I saw the imperfections of the constitution I aided in the birth of, before it was handed to the public; but I am fully persuaded it is the best that can be obtained at this time, that it is free from many of the imperfections with which it is charged, and that it or disunion is before us to choose from. If the first is our election, when the defects or it are experienced, a constitutional door is opened for amendments and may be adopted in a peaceable manner, without tumult or disorder." Washington to Charles Carter, 14 December 1787, in Penn.

Packet of 11 January 1788. The original draft of the letter is preserved in the State Department. *Bancroft on the History of the Constitution of the United States*, 380.

The letter of Washington said: The powers necessary to be vested in "the general government of the union" are too extensive to be delegated to "one body of men." "It is impracticable, in the federal government of these states, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all; it is difficult to draw with precision the line between those rights which must be surrendered and those which may be reserved; on the present occasion this difficulty was increased by a difference among the several states as to their situation, extent, habits, and particular interests. We kept steadily in view the consolidation of our union, in which is involved our prosperity, felicity, safety, perhaps our national existence. And thus the constitution which we now present is the result of that mutual deference and concession which the peculiarity of our political situation rendered indispensable."

The constitution met with opposition indefatigable from Richard Henry Lee, (Carrington to Madison, Sunday, 23 September 1787) supported by Nathan Dane, (Gilpin, 643, 650; Elliot, 566, 568.) *Bancroft on the History of the Constitution of the United States*, 371.

Monroe wrote to Madison that his "strong objections" to the constitution "were overbalanced by the arguments in its favor." Monroe to Madison, 13 October 1787. *Bancroft on the History of the Constitution of the United States*, 377.

Mr. Wilson, of Pennsylvania, said of it:

"The United States exhibit to the world the first instance of a nation unattacked by external force, unconvulsed by domestic insurrections, assembling voluntarily, deliberating fully, and deciding calmly concerning the system of government under which they and their posterity should live. To form a good system of government for a single city or an inconsiderable state has been thought to require the strongest efforts of human genius; the views of the convention were expanded to a large portion of the globe.

"The difficulty of the business was equal to its magnitude. The United States contain already thirteen governments mutually independent; their soil, climates, productions, dimensions, and numbers are different; in many instances a difference and even an opposition subsists among their interests, and is imagined to subsist in many more. Mutual concessions and sacrifices, the consequences of mutual forbearance and conciliation, were indispensably necessary to the success of the great work." *Bancroft on the History of the Constitution of the United States*, 384.

"The powers of the federal government and those of the state governments are drawn from sources equally pure. The principle of representation, unknown to the ancients, is confined to a narrow corner of the British constitution. For the American states were reserved the glory and happiness of diffusing this vital principle throughout the continent parts of government.



"The convention found themselves embarrassed with another difficulty of peculiar delicacy and importance; I mean that of drawing a proper line between the national government and the governments of the several states. Whatever object of government is confined in its operation and effects within the bounds of a particular state should be considered as belonging to the government of that state; whatever object of government extends in its operation or efforts beyond the bounds of a particular state should be considered as belonging to the government of the United States. To remove discretionary construction, the enumeration of particular instances in which the application of the principle ought to take place will be found to be safe, unexceptionable, and accurate." *Bancroft on the History of the Constitution of the United States*, 385-6.

On the next day Wilson summed up his defense of the constitution and repeated: "This system is not a compact; I can not discern the least trace of a compact; the introduction to the work is not an unmeaning flourish; the system itself tells you what it is, an ordinance, an establishment of the people." Elliot, ii, 497, 499. *Bancroft on the History of the Constitution of the United States*, 390.

Bancroft, the historian, thus describes the debates, and correspondence as to the ratification of the Constitution:

Parsons recapitulated and answered the objections brought against the constitution, and closed his remarks by saying: "An increase of the powers of the federal constitution by usurpation will be upon thirteen completely organized legislatures having means as well as inclination to oppose it successfully. The people themselves have the power to resist it without an appeal to arms. An act of usurpation is not a law, and therefore is not obligatory; and any man may be justified in his resistance. Let him be considered as a criminal by the general government; his own fellow-citizens are his jury; and if they pronounce him innocent, not all the powers of congress can hurt him." Elliot, ii, 94. *Bancroft on the History of the Constitution of the United States*, 461-2.

Jefferson, while in Congress as the successor of Madison, had led the way zealously toward rendering the American constitution more perfect. "The federal convention," so he wrote to one correspondent on hearing who were its members, "is really an assembly of demigods;" and to another: "It consists of the ablest men in America." He hoped from it a broader reformation, and saw with satisfaction "a general disposition through the states to adopt what it should propose." To Washington he soberly expressed the opinions from which during his long life he never departed: "To make our states one as to all foreign concerns, preserve them several as to all merely domestic, to give to the federal head some peaceable mode of enforcing its just authority, to organize that head into legislative, executive, and judiciary departments, are great desiderare." Jefferson, i, 349, 260, 149, 264, 250, 251.

Early in November Jefferson received a copy of the new constitution, and approved the great mass of its provisions. (Jefferson, i., 79, and ii., 586.) But once he called it a kite set up to keep the hen-yard

in order; (Jefferson, ii., 319) and with three or four new articles he would have preserved the venerable fabric of the old confederation as a sacred relic.

To Madison he explained himself in a long and deliberate letter. A house of representatives elected directly by the people he thought would be far inferior to one chosen by the state legislatures; but he accepted that mode of election from respect to the fundamental principle that the people are not to be taxed but by representatives chosen immediately by themselves. He was captivated by the compromise between the great and smaller states, and the method of voting in both branches of the legislature by persons instead of voting by states; but he utterly condemned the omission of a bill of rights, and the abandonment of the principle of rotation in the choice of the president. "I own," he added of himself, "I am not a friend to a very energetic government;" for he held that it would be "always oppressive." He presumed that Virginia would reject the new constitution; for himself he said: "It is my principle that the will of the majority should prevail; if they approve, I shall cheerfully concur in the proposed constitution, in hopes they will amend it whenever they shall find that it works wrong." In February, 1788, he wrote to Madison and at least one more of his correspondents: "I wish with all my soul that the nine first conventions may accept the new constitution, to secure to us the good it contains; but I equally wish that the four latest, whichever they may be, may refuse to accede to it till a declaration of rights be annexed; but no objection to the new form must produce a schism in our union." This was the last word from him which reached America in time to have any influence. But in May of that year, so soon as he heard of the method adopted by Massachusetts, he declared that it was far preferable to his own, and wished it to be followed by every state, especially by Virginia. To Madison he wrote in July: "The constitution is a good canvas on which some strokes only want retouching." In 1789 to a friend in Philadelphia he wrote with perfect truth: "I am not of the party of federalists; but I am much further from that of the anti-federalists."

The constitution was to John Adams more of a surprise than to Jefferson; but at once he formed his unchanging judgment, and in December, 1787, he wrote of it officially to Jay: "The public mind can not be occupied about a nobler object than the proposed plan of government. It appears to be admirably calculated to cement all America in affection and interest as one great nation. A result of compromise can not perfectly coincide with every one's ideas of perfection; but, as all the great principles necessary to order, liberty, and safety are respected in it, and provision is made for amendments as they may be found necessary, I hope to hear of its adoption by all the states." John Adams's Works, viii., 467; Diplomatic Correspondence, 1783-1789, v., 356. *Bancroft on the History of the Constitution of the United States*, pp. 406-7-8.

Madison on the fourteenth replied: "There never was, there never will be, an efficient government in which both the sword and purse are not vested, though they may not be given to the same member of government. The sword is in the hands of the British king; the purse in the hands of the parliament. It is so in America, as far as any analogy

can exist. When power is necessary and can be safely lodged, reason commands its cession. From the first moment that my mind was capable of contemplating political subjects I have had a uniform zeal for a well-regulated republican government. The establishment of it in America is my ardent desire. If the bands of the government be relaxed, anarchy will produce despotism. Faction and confusion preceded the revolutions in Germany; faction and confusion produced the disorders and commotions in Holland. In this commonwealth, and in every state in the Union, the relaxed operation of the government has been sufficient to alarm the friends of their country. The rapid increase of population strongly calls for a republican organization. There is more responsibility in the proposed government than in English. Our representatives are chosen for two years, in England for seven. Any citizen may be elected here; in Great Britain no one without an estate of the annual value of six hundred pounds sterling can represent a county; nor a corporation without half as much. If confidence be due to the government there, it is due tenfold here." *Bancroft on the History of the Constitution of the United States*, 428-9.

Gladstone said of it:

"The American constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man; but it had its forerunners." *Bancroft on the History of the Constitution of the United States*, 441.

On the twenty-seventh Hamilton replied by a full declaration of his opinions. "The establishment of a republican government on a safe and solid basis is the wish of every honest man in the United States, and is an object, of all others, the nearest and most dear to my own heart. This great purpose requires strength and stability in the organization of the government, and vigor in its operations. The state governments are essentially necessary to the form and spirit of the general system. With the representative system a very extensive country may be governed by a confederacy of states in which the domestic legislature has only general powers, and the civil and domestic concerns of the people are regulated by the laws of the several states. State governments must form a leading principle. They can never lose their powers till the whole people of America are robbed of their liberties." *Bancroft on the History of the Constitution of the United States*, 457.

### **Jefferson's Views of the Constitution.**

It was said by Mr. Jefferson's enemies that he was opposed to and was an enemy of the Constitution. Nothing could be more untrue. The foregoing and following notes gives his true views. There were, of course, many provisions he did not like, and many things he desired added. This was true as to every man who aided in forming or adopting it.

In 1787 Mr. Jefferson wrote to Mr. William Carmichael, as follows:

Our new Constitution is powerfully attacked in the American newspapers. The objections are, that its effect would be to form the thirteen States into one; that, proposing to melt all down into one general government, they have fenced the people by no declaration of rights; they have not renounced the power of keeping a standing army, they have not secured the liberty of the press; they have not reserved the power of abolishing trials by jury in civil cases; they have proposed that the laws of the federal legislatures shall be paramount to the laws and constitutions of the States; they have abandoned rotation in office; and particularly, their President may be re-elected from four years to four years for life, so as to render him a King for life, like a King of Poland; and they have not given him either the check or aid of a council. To these they add calculations of expense, etc., etc., to frighten the people. You will perceive that these objections are serious, and some of them not without foundation. The Constitution, however, has been received with a very general enthusiasm, and as far as can be judged from external demonstrations, the bulk of the people are eager to adopt it. *6 Jefferson's Writings, (mem. ed.), pp. 380-381.*

In 1787 Mr. Jefferson wrote James Madison, as follows:

I have little to fill a letter. I will, therefore, make up the deficiency, by adding a few words on the Constitution proposed by our convention.

I like much the general idea of framing a government, which should go on of itself, peaceable, without needing continual recurrence to the State legislatures. I like the organization of the government into legislative, judiciary and executive. I like the power given the legislature to levy taxes, and for that reason solely, I approve of the greater House being chosen by the people directly. *6 Jefferson's Writings, (mem. ed.), pp. 386-387.*

I am captivated by the compromise of the opposite claims of the great and little States, of the latter to equal, and the former to proportional influence. I am much pleased, too, with the substitution of the method of voting by person, instead of that of voting by States; and I like the negative given to the Executive, conjointly with a third of either House; though I should have liked it better, had the judiciary been associated for that purpose, or invested separately with a similar power. There are other good things of less moment. I will now tell you what I do not like. First, the omission of a bill of rights, providing clearly, and without the aid of sophism, for freedom of religion, freedom of the press, protection against standing armies, restriction of monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land, and not by the laws of the nations. *6 Jefferson's Writings, (mem. ed.), pp. 387-8.*

It would have been much more just and wise to have concluded the other way, that as most of the States had preserved with jealousy this sacred palladium of liberty, those who had wandered, should be brought back to it; and to have established general right rather than general



wrong. For I consider all the ill as established, which may be established. I have a right to nothing, which another has a right to take away; and Congress will have a right to take away trials by jury in all civil cases. Let me add, that a bill of rights is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse, or rest on inference. *6 Jefferson's Writings, (mem. ed.), pp. 388-9.*

I do not pretend to decide, what would be the best method of procuring the establishment of the manifold good things in this constitution, and of getting rid of the bad. Whether by adopting it, in hopes of future amendment; or after it shall have been duly weighed and canvassed by the people, after seeing the parts they generally dislike, and those they generally approve, to say to them, "We see now what you wish." You are willing to give to your federal government such and such powers; but you wish, at the same time, to have such and such fundamental rights secured to you, and certain sources of convulsion taken away. *6 Jefferson's Writings, (mem. ed.), p. 390.*

At all events, I hope you will not be discouraged from making other trials, if the present one should fail. We are never permitted to despair of the commonwealth. I have thus told you freely what I like, and what I dislike, merely as a matter of curiosity; for I know it is not in my power to offer matter of information to your judgment, which has been formed after hearing and weighing everything which the wisdom of man could offer on these subjects. I own, I am not a friend to a very energetic government. It is always oppressive. It places the governors indeed more at their ease, at the expense of the people. The late rebellion in Massachusetts has given more alarm, than I think it should have done. Calculate that one rebellion in thirteen States in the course of eleven years, is but one for each State in a century and a half. No country should be so long without one. Nor will any degree of power in the hands of government, prevent insurrections. In England, where the hand of power is heavier than with us, there are seldom half a dozen years without an insurrection. *6 Jefferson's Writings, (mem. ed.), p. 391.*

After all, it is my principle that the will of the majority should prevail. If they approve the proposed constitution in all its parts, I shall concur in it cheerfully, in hopes they will amend it, whenever they shall find it works wrong. This reliance can not deceive us, as long as we remain virtuous; and I think we shall do so, as long as agriculture is our principal object, which will be the case, while there remains vacant lands in any part of America. When we get piled upon one another in large cities, as in Europe, we shall become corrupt as in Europe, and go to eating one another as they do there. *6 Jefferson's Writings, (mem. ed.), p. 392-3.*

The instability of our laws is really an immense evil. I think it would be well to provide in our constitutions, that there shall always be a twelve-month between the engrossing a bill and passing it; that it should then be offered to its passage without changing a word; and that if circumstances should be thought to require a speedier passage, it should take two-thirds of both Houses, instead of a bare majority. *6 Jefferson's Writings, (mem. ed.), p. 393.*

On December 21, 1787, Mr. Jefferson wrote Mr. Carrington, as follows:

As to the new Constitution, I find myself nearly a neutral. There is a great mass of good in it, in a very desirable form; but there is also, to me, a bitter pill or two. I have written somewhat lengthily to Mr. Madison on this subject, and will take the liberty to refer you to that part of my letter to him. I will add one question to what I have said there. Would it not have been better to assign to Congress exclusively the article of imposts for federal purposes, and to have left direct taxation exclusively to the States? I should suppose the former fund sufficient for all probable events, aided by the land office. *6 Jefferson's Writings, (mem. ed.), pp. 394-5.*

On May 27, 1788, Mr. Jefferson wrote to Mr. Carmichael as follows:

I was much pleased with many and essential parts of this instrument, from the beginning. But I thought I saw in it many faults, great and small. What I have read and reflected has brought me over from several of my objections of the first moment, and to acquiesce under some others. Two only remain, of essential consideration, to wit, the want of a bill of rights, and the expunging the principle of necessary rotation in the offices of President and Senator. At first I wished that when nine States should have accepted the constitution, so as to insure us what is good in it, the other four might hold off till the want of the bill of rights, at least, might be supplied. But I am now convinced that the plan of Massachusetts is the best, that is, to accept, and to amend afterwards. If the States which were to decide after her, should all do the same, it is impossible but they must obtain the essential amendments. It will be more difficult, if we lose this instrument, to recover what is good in it, than to correct what is bad, after we shall have adopted it. It has, therefore, my hearty prayers. *7 Jefferson's Writings (mem. ed.), pp. 28-9.*

On the same day Mr. Jefferson wrote to Col. Carrington as follows:

The second amendment which appears to me essential is the restoring the principle of necessary rotation, particularly to the Senate and Presidency: but most of all to the last. Re-eligibility makes him an officer for life, and the disasters inseparable from an elective monarchy, render it preferable if we can not tread back that step, that we should go forward and take refuge in an hereditary one. Of the correction of this article, however, I entertain no present hope, because I find it has scarcely excited an objection in America. And if it does not take place ere long, it assuredly never will. The natural progress of things is for liberty to yield and the government to gain ground. As yet our spirits are free. Our jealousy is only put to sleep by the unlimited confidence we all repose in the person to whom we all look as our president. After him inferior characters may perhaps succeed, and awakens us to the danger which his merit has led us into. For the present, however, the general adoption is to be prayed for. *7 Jefferson's Writings, (mem. ed.), pp. 36-7.*

## The Making of the Constitution

On March 18, 1789, Mr. Jefferson wrote<sup>1</sup> to Col. Humphreys:

The operations which have taken place in America lately, fill me with pleasure. In the first place, they realize the confidence I had, that whenever our affairs go obviously wrong, the good sense of the people will interpose, and set them to rights. The example of changing a constitution, by assembling the wise men of the State, instead of assembling armies, will be worth as much to the world as the former examples we had given them. The Constitution, too, which was the result of our deliberations, is unquestionably the wisest ever yet presented to men, and some of the accommodations of interest which it has adopted, are greatly pleasing to me, who have before had occasions of seeing how difficult those interests were to accommodate. A general concurrence of opinion seems to authorize us to say it has some defects. I am one of those who think it a defect, that the important rights, not placed in security by the frame of the Constitution itself, were not explicitly secured by a supplementary declaration. There are rights which it is useless to surrender to the government, and which governments have yet always been found to invade. These are the rights of thinking, and publishing our thoughts by speaking or writing; the right of free commerce; the right of personal freedom. There are instruments for administering the government, so peculiarly trustworthy, that we should never leave the legislature at liberty to change them. The new Constitution has secured these in the executive and legislative departments; but not in the judiciary. It should have established trials by the people themselves, that is to say, by jury. There are instruments so dangerous to the rights of the nation, and which place them so totally at the mercy of their governors, that those governors, whether legislative or executive, should be restrained from keeping such instruments on foot, but in well-defined cases. Such an instrument is a standing army. *7 Jefferson's Writings, (mem. ed.), pp. 322-323.*

## Hostility and Opposition to the Constitution

It was well said by John Quincy Adams that the Constitution was "extorted from the grinding necessity of a reluctant nation." It was accepted by a small majority as the only alternative to disruption and anarchy. Its ratification was the success of the men who were interested in the security of property, the maintenance of order, and the enforcement of obligations against those who desired communism, lawlessness and repudiation. It was a conflict between the cities and the backwoods, between the mountains and the plains. And the opposition was led by those cliques and families who had learned to control for their private interests the state patronage of which the new government must necessarily deprive them.

The battle was waged on the stump and by pamphleteering, and gave birth to that great repository of political science, *The Federalist*. *Foster on the Constitution, Vol. 1, p. 3.*

The Federal Convention itself held its debates in secret for fear lest the public should become so excited that there would be no hope

<sup>1</sup>The sentiment expressed in this letter led to several of the first ten amendments to the Constitution.

of any successful result of the deliberations. Twice at least was it on the point of breaking up in despair. So little hope did there seem of any practical result, that at last the sceptic Franklin advised his colleagues to take refuge in prayer. Even at the end, it was the belief of the strongest supporters of the Constitution, that it could not hold the country together for more than a few years.

Elements of discord abounded in that small assembly. The States which were prominent in wealth and population protested against the injustice of vesting the control elsewhere than in a majority of population or of property. The smaller States, which in the Continental Congress and under the Confederation had an equal vote, insisted that they would never surrender the right which they had thus obtained. *Foster on the Constitution, Vol. 1, p. 5.*

### Objections to the Constitution

It can not be forgotten, that among the arguments addressed to those who apprehend danger to liberty from the establishment of the general government over so great a country, the appeal was emphatically made to the intermediate existence of the State governments, between the people and that government; to the vigilance with which they would decry the first symptoms of usurpation; and to the promptitude with which they would sound the alarm to the public. This argument was probably not without its effect; and if it was a proper one then to recommend the establishment of the Constitution, it must be a proper one now to assist in its interpretation.<sup>1</sup> *4 Writings of Madison, p. 554-555.*

In 1787, November 13, Mr. Jefferson thus wrote to Mr. John Adams:<sup>1</sup>

How do you like our new Constitution? I confess there are things in it which stagger all my dispositions to subscribe to what such an Assembly has proposed. The house of federal representatives will not be adequate to the management of affairs, either foreign or federal. Their President seems a bad edition of a Polish King. He may be elected from four years to four years, for life. Reason and experience prove to us, that a chief magistrate, so continuable, is an office for life. When one or two generations shall have proved that this is an office for life, it becomes, on every occasion, worthy of intrigue, of bribery, of force, and even of foreign interference. It will be of great consequence to France and England, to have America governed by a Gallo-man or Angloman. Once in office, and possessing the military force of the union, without the aid or check of a council, he would not be easily dethroned, even if the people could be induced to withdraw their votes from him. I wish that at the end of the four years they had made him forever ineligible a second time. Indeed, I think all the good of this new Constitution might have been couched in three or four new articles,

<sup>1</sup>The present tendency is to destroy all protection which the States can afford the people. To take all the power that was reserved to the States or the people thereof, and vest it in one central government, and then

vest all those powers in one person, the President. We are surely headed toward monarchy.

<sup>1</sup>Were Jefferson living to-day, he could truly say to Adams, "I told you so."



to be added to the good, old venerable fabric, which should have been preserved even as a religious relique. 6 *Jefferson's Writings*, (*mem. ed.*), p. 370.

On July 31, 1788, Mr. Jefferson wrote Mr. Madison:

Why suspend the habeas corpus in insurrections and rebellions? The parties who may be arrested, may be charged instantly with a well-defined crime; of course, the judge will remand them. If the public safety requires that the government should have a man imprisoned on less probable testimony, in those than in other emergencies, let him be taken and tried, retaken and retried, while the necessity continues, only giving him redress against the government, for damages. Examine the history of England. See how few of the cases of the suspension of the habeas corpus law, have been worthy of that suspension. *Jefferson's Writings*, (*mem. ed.*), p. 97.

If no check can be found to keep the number of standing troops within safe bounds, while they are tolerated as far as necessary, abandon them altogether, discipline well the militia, and guard the magazines with them. More than magazine guards will be useless, if few, and dangerous, if many. No European nation can ever send against us such a regular army as we need fear, and it is hard, if our militia are not equal to those of Canada or Florida. My idea then, is that though proper exceptions to these general rules are desirable, and probably practicable, yet if the exceptions can not be agreed on, the establishment of the rules, in all cases, will do ill in very few. I hope, therefore, a bill of rights will be formed, to guard the people against the federal government, as they are already guarded against their State governments, in most instances. 7 *Jefferson's Writings*, (*mem. ed.*), pp. 98-9.

On August 27, 1788, Mr. Jefferson wrote Mr. Carmichael as follows:

Though I am much pleased with this successful issue of the New Constitution, yet I am more so, to find that one of its principal defects<sup>1</sup> (the want of a declaration of rights) will pretty certainly be remedied. I suppose this, because I see that both people and conventions, in almost every State, have concurred in demanding it. Another defect, the perpetual re-eligibility of the same President, will probably not be cured during the life of General Washington. His merit has blinded our countrymen to the danger of making so important an officer re-eligible. I presume there will not be a vote against him in the United States. It is more doubtful who will be Vice-President. The age of Dr. Franklin and the doubt whether he could accept it, are the only circumstances that admit a question, but that he would be the man. After these two characters of first magnitude, there are so many which present themselves equally, on the second line, that we can not see which of them will be singled out. John Adams, Hancock, Jay, Madison, Rutledge, will all be voted for. 7 *Jefferson's Writings*, (*mem. ed.*), pp. 124-5.

<sup>1</sup>Some of Mr. Jefferson's objections were cured by the first ten amendments.

Mr. Jefferson, in a letter to Mr. Madison, November 18, 1788, acknowledging a copy of the *Federalist* papers written by Jay, Hamilton, and Madison, says:

With respect to the *Federalist*, the three authors (\*) had been named to me. I read it with care, pleasure and improvement, and was satisfied there was nothing in it by one of those hands, and not a great deal by a second. It does the highest honor to the third, as being, in my opinion, the best commentary on the principles of government, which ever was written. In some parts, it is discoverable that the author means only to say what may be best said in defence of opinions, in which he did not concur. But in general, it establishes firmly the plan of government. I confess, it has rectified me on several points. As to the bill of rights, however, I still think it should be added; and I am glad to see that three States have at length considered the perpetual re-eligibility of the President, as an article which should be amended. I should deprecate with you, indeed, the meeting of a new convention. I hope they will adopt the mode of amendment by Congress and the Assemblies, in which case, I should not fear any dangerous innovation in the plan.

On December 4, 1788, Mr. Jefferson wrote Gen. Washington as follows:

I have seen with infinite pleasure, our new Constitution accepted by eleven States, not rejected by the twelfth; and that the thirteenth happens to be a State of the least importance. It is true, that the minorities in most of the accepting States have been very respectable; so much so as to render it prudent, were it not otherwise reasonable, to make some sacrifice to them. I am in hopes, that the annexation of a bill of rights to the Constitution will alone draw over so great a proportion of the minorities as to leave little danger in the opposition of the residue; and that this annexation may be made by Congress and the Assemblies, without calling a convention, which might endanger the most valuable parts of the system. ? *Jefferson's Writings, (mem. ed.), p. 223.*

On February 9, 1789, Mr. Jefferson wrote to Mr. Short, as follows:

Gen. Washington will be President, and probably Mr. Adams Vice President. So that the Constitution will be put under way by those who will give it a fair trial. It does not seem probable that the attempt of New York to have another convention to make amendments, will succeed, though Virginia concurs in it. It is tolerably certain that Congress will propose amendments to the Assemblies, as even the friends of the Constitution are willing to make amendments; some from a conviction they are necessary, others, from a spirit of conciliation.

\*The authors were, of course, Jay, Hamilton, and Madison. Jay wrote very few of the papers, Hamilton most, and Madison the remainder. It is doubtful as to whether Mr. Jefferson

refers to Madison or Hamilton when he says, the author is writing the views of others and not of himself, though most probably to Madison.

The addition of a bill of rights, will, probably, be the most essential change. 7 *Jefferson's Writings, (mem. ed.), pp. 282-3.* The first ten amendments constituted the "bill of rights."

On March 13, 1789, Mr. Jefferson wrote Mr. Hopkinson as follows:

You say that I have been dished up to you as an anti-federalist, and ask me if it be just. My opinion was never worthy enough of notice to merit citing; but since you ask it, I will tell it to you. I am not a federalist, because I never submitted the whole system of my opinion to the creed of any party of men whatever, in religion, in philosophy, in politics or in anything else, where I was capable of thinking for myself. Such an addiction, is the last degradation of a free and moral agent. If I could not go to heaven but with a party, I would not go there at all. Therefore, I am not of the party of federalists. But I am much farther from that of the anti-federalists. I approved, from the first moment, of the great mass of what is in the new Constitution; the consolidation of the government; the organization into executive, legislative and judiciary; the subdivision of the legislative; the happy compromise of interests between the great and little States, by the different manner of voting in the different Houses; the voting by persons instead of States; the qualified negative on laws given to the executive, which, however, I should have liked better if associated with the judiciary also, as in New York; and the power of taxation. I thought at first that the latter might have been limited. A little reflection soon convinced me it ought not to be. 7 *Jefferson's Writings, (mem. ed.), p. 300.*

With respect to the re-eligibility of the President, I find myself differing from the majority of my countrymen; for I think there are but three States out of the eleven which have desired an alteration of this. And indeed, since the thing is established, I would wish it not to be altered during the life of our great leader, whose executive talents are superior to those, I believe, of any man in the world, and who, alone, by the authority of his name and the confidence reposed in his perfect integrity, is fully qualified to put the new government so under way, as to secure it against the efforts of opposition. But, having derived from our error all the good there was in it, I hope we shall correct it, the moment we can no longer have the same name at the helm. 7 *Jefferson's Writings, (mem. ed.), pp. 301-2, note.* The enemies of Mr. Jefferson have always insisted upon placing him as an enemy of the Constitution, and of Washington. No greater wrong was ever done this great and noble statesman. The two quotations show the falsity of these charges.

In 1786, Mr. Jefferson wrote to a friend:

The aspect of our politics has wonderfully changed since you left us. In place of that noble love of liberty and republican government, which carried us triumphantly through the war, an Anglican monarchical aristocratical party has sprung up, whose avowed object is to draw over us the substance, as they have already done the forms, of the British government. The main body of our citizens, however, re-

main true to their republican principles; the whole landed interest is republican, and so is a great mass of talents. *9 Jefferson's Writings, (mem. ed.), pp. 335-6.*

If Mr. Adams<sup>1</sup> can be induced to administer the government on its true principles, and to relinquish his bias to an English constitution, it is to be considered whether it would not be on the whole for the public good to come to a good understanding with him as to his future elections. He is perhaps the only sure barrier against Hamilton's getting in. *9 Jefferson's Writings, (mem. ed.), p. 359.*

Mr. Jefferson is authority for the contention that in the early history of the United States, there was a strong party headed by Hamilton and Adams, who desired to establish a Monarchical government in lieu of that established by the Constitution. If Mr. Jefferson is correct there is no doubt of the fact, though it has been denied on high authority. Among the last letters he wrote, is one to Wm. Short, in 1825, which gives the facts. See *16 Jefferson's Writings, 92, et seq.* The following are excerpts from this letter:

At my own table, in presence of Mr. Adams, Knox, Randolph, and myself, in a dispute between Mr. Adams and himself [Mr. Hamilton], he avowed his preference of monarchy over every other government, and his opinion that the English was the most perfect model of government ever devised by the wit of man, Mr. Adams agreeing "if its corruptions were done away." While Hamilton insisted that "with these corruptions it was perfect, and without them it would be an impracticable government." Can any one read Mr. Adams' defence of the American Constitutions without seeing that he was a monarchist? And J. Q. Adams, the son, was more explicit than the father, in his answer to Paine's Rights of Man. So much for leaders. Their followers were divided. Some went the same lengths; other, and I believe the greater part, only wished a stronger Executive. *16 Jefferson's Writings, (mem. ed.), p. 93.*

Monarchy, to be sure, is now defeated, and they wish it should be forgotten that it was ever advocated. They see that it is desperate, and treat its imputation to them as a calumny; and I verily believe that none of them have it now in direct aim. Yet the spirit is not done away. The same party take now what they deem the next best ground, the consolidation of the government; the giving to the federal member of the government, by unlimited constructions of the Constitution, a control over all the functions of the States, and the concentration of all power ultimately at Washington. *16 Jefferson's Writings (mem. ed.), p. 95.*

<sup>1</sup>The foregoing letter shows what he feared. Strange as it may seem, Adams nor Hamilton was not Adams' successor, he was no other than Mr. Jefferson himself, and but for Hamilton and Washington, it would have been Burr. This act of Hamilton in choosing between Burr and Jefferson probably cost him his life. Burr thought that as he and Hamilton were

from the same State and the known differences of views between Jefferson and Hamilton, such as to cause Jefferson to resign the position of Secretary of State under the second administration of Washington, that Hamilton could and should support Burr, but he favored Jefferson, and Burr never forgave him, and this probably led to the duel in which Hamilton lost his life.



Some of the main defects argued against the adoption of the original Constitution, we see, were the re-eligibility of the President. The want of a counsel from all the States, and a bill of rights; this defect was cured by the first ten amendments. The friends of the Constitution candidly admitted that the Constitution had defects, but claimed and insisted truthfully, that it was the best which the political situation, the habits and customs would admit, and better than that of any other nation or government up to that time. They also then said truly that some of its defects would be cured by amendments, especially the one as to the lack of a bill of rights, and such were proposed by the first Congress which assembled under it, and ten of the thirteen amendments were ratified. Hamilton said we need never expect to see a people work from imperfect to perfect. That the result of any deliberative body must necessarily be a compound of errors and prejudices, as well as of good sense and wisdom. Time alone can bring it to perfection. Inconvenience will cause mistakes to be banished. Hamilton and Madison thought that the establishment of the constitution in time of peace was a prodigy. Gladstone pronounced it the grandest work ever struck off by the hand of man.

### **Written and Unwritten Constitutions**

Unwritten constitutions, such as England's or Great Britain's, are not in truth constitutions in the sense the term is used in America. They are made up of traditions, customs, grants, charters of Kings, and rulers, statutes, etc., all of which are subject to change or obliteration by some power other than the people. There are in such governments some power, such as Parliament, the King, the Emperor, the Czar, or other dictator, which can either change, obliterate, or disregard any constitutional provision. Hence, they are not constitutions in the sense we use the term.

The so-called unwritten constitution of Great Britain consists, in large measure, of acts of parliament, royal grants and charters, declarations of rights and decisions of the courts. It also comprises certain maxims, principles, or theories of government which, though not enacted with the force of law, have always been acquiesced in by the people and acted upon by the rulers, and thus, possessing historic continuity, may be said to enter into the fundamental conception of the nature and system of the government. The differences between written and unwritten constitutions, as these terms generally employed, are chiefly as follows: First. A written constitution sums up in one instrument the whole of what is considered to belong to the constitution

of the state; whereas, in the case of an unwritten constitution, its various parts are to be sought in diverse connections, and are partly statutory and partly customary. Second. A written constitution is either granted by the ruler or ordained by the people at one and the same time; while an unwritten constitution is gradually developed, and is contributed to not only by the executive and legislative branches of government, but also by the courts, and by the recognition, by rulers and people, of usages and theories gradually acquiring the force of law. Third. A written constitution is a creation or product, while an unwritten constitution is a growth. The one may be influenced, in its essentials, by history, but is newly made and set forth. The other is not only defined by history, but, in a measure, is history. Fourth. A written constitution, in its letter, if not in its spirit, is incapable of further growth or expansion. It is fixed and final. An unwritten constitution, on the other hand, will expand and develop, of itself, to meet new exigencies or changing conditions of public opinion or political theory. Fifth. A written constitution, at least in a free country, is a supreme and paramount law, which all must obey, and to which all statutes, all institutions, and all governmental activities must bend, and which can not be abrogated except by the people who created it. An unwritten constitution may be altered or abolished, at any time or in any of its details, by the lawmaking power. *Black on Constitutional Laws*, 6.

Paper constitutions have been the target for the ridicule of most writers during the present century who have thought themselves political philosophers. Unstable as water, they can not excel, had been the judgment upon them by historians. "Have you a copy of the French Constitution?" was asked of a bookseller during the French Republic. "We do not deal in periodical literature," was the reply. In the United States, and only in the United States, has a written constitution survived a hundred years, while during the same time the forms of the governments of all other nations have changed more often and more radically than have their respective boundaries. *Foster on the Constitution*, Vol. 1, p. 1.

### **When and How the Constitution Was Made**

It was not until the 25th of May, 1787, that a majority of States were represented at Philadelphia. The Federal Convention then organized and elected president George Washington. Rhode Island took no part in the proceedings; but delegates, appointed by the legislatures of the other twelve States, finally appeared. On September 17th the Constitution was completed and was signed by less than three-fourths of the delegates who attended, many of these doubting its wisdom and fearing its failure, but accepting the scheme as the only chance of escape from anarchy and dissolution. The delegates with most influence in the Convention were James Madison of Virginia, the two Pinckneys of South Carolina, Rufus King of Massachusetts, Roger Sherman of Connecticut, James Wilson of Pennsylvania, and Gouverneur Morris of the last named State, to whose pen the style of the instrument owes its symmetry and clarity. Hamilton and Franklin would have preferred different forms of government, the former one more aristocratic, the latter more of a democracy; but Franklin ren-

dered great service in promoting harmony in the convention, and Hamilton in securing the subsequent ratification. Congress eleven days after the close of the Convention, without any recommendation, transmitted the document to the State legislatures for submission to State conventions. On June 21, 1787, it was ratified by the ninth State, New Hampshire, and was then binding upon all who had previously acceded; but it did not go into effect until the assemblage of the first Congress at Philadelphia on March 3, 1789. *Foster on the Constitution, Vol. I, pp. 21-22.*

### Proceedings of the Convention Which Made the Constitution

Mr. Webster, in his remarks on the subject of making an appropriation to purchase the Madison<sup>1</sup> papers, said:

It is well known that the convention of great men who formed our Constitution sat with closed doors; that no report of their proceedings was published at that time; and that their debates were listened to by none but themselves and the officers in attendance. We have, indeed, the official journal kept by this order. It is an important document, but it informs us only of their official acts. We get from it nothing whatever of the debates in that illustrious body. Besides this, there are only a few published sketches, more or less valuable. But the connection of Mr. Madison with the Constitution and the government, and his profound knowledge of all that related to both, would necessarily give to any reports which he should have taken a superior claim to accuracy. It was his purpose when he entered the body, to report its whole proceedings. He chose a position which best enabled him to do so; nor was he absent a single day during the whole period of its sittings. It was further understood that his report of the leading speeches had been known to them all, that he was thus collecting materials for a detailed report of their proceedings. *4 Webster's Works, (7th ed.), pp. 301-302.*

### Madison, the Father of the Constitution

Here is what Mr. Jefferson said of him in 1812:

You probably do not know Mr. Madison personally, or at least intimately, as I do. I have known him from 1779, when he first came into the public councils, and from three and thirty years trial. I can say conscientiously that I do not know in the world a man of purer integrity, more dispassionate, disinterested and devoted to genuine republicanism; nor could I, in the whole scope of America and Europe, point out an abler head. *13 Jefferson's Writings, (mem. ed.), p. 190.*

### The Constitutional Convention

The Federal Convention was composed of men who had been accustomed to rule and legislate in the camp and in the senate. They had

<sup>1</sup>Mr. Madison is well and fitly called the Father of the Constitution. He did not belong to either extreme, but occupied medium ground between the two extremes. As the Constitution was a compromise between those who wished to destroy the States and form one central government, and those who

wished to take from the States few, if any of their sovereign powers, and desired merely to form a new Confederacy of the States, the Constitution was therefore more in accord with his views than of any other member in the Convention.

learned by experience the impossibility of foreseeing the results of untried forms of government, founded on *a priori* reasoning. They had suffered, not only from the arbitrary powers of the crown and Parliament, but also from the imbecility of Congress. They had realized, too, the evils resulting from hasty action by State legislatures unrestricted from making breaches of the public faith and setting aside private contracts. They had acquired by tradition, as well as from the study of "The Spirit of the Laws," that respect for the British Constitution with which Montesquieu had inspired Europe. The superiority of the State Constitutions, which bore to that a resemblance, over the Articles of Confederation, was of easy recognition. As soon as it was determined that the new government should be national in form', they turned for instruction to the description of the Constitution of Great Britain by Sir William Blackstone. *Foster on the Constitution, Vol. 1, pp. 38-9.*

The convention was composed of delegates from all the states except Rhode Island. The resolution from which they derived their authority contemplated nothing more than a revision of the articles of confederation. But the convention was not long in determining that the whole scheme of government therein contained was so defective that it was beyond hope that the evils and inconveniences complained of by the people could be remedied by any process of patching or mending the old constitution. In their judgment, what was needed was an entirely new frame of government. And this they proceeded to construct. *Black on Constitutional Laws, 40-1.*

The draft of the construction was laid before Congress and by them submitted to the several states. It contained a provision that as soon as it should have been ratified by nine of the states, it should become binding on those states. There ensued long, exhaustive, and acrimonious debates on the question of its adoption. But in the course of a year eleven of the states had ratified the constitution, and in September, 1788, Congress made provision for the first election of federal officers and the inauguration of the national government under the new constitution. On the 30th of April, 1789, the first President of the United States took the oath of office, and the present government began the exercise of its functions as marked out in the constitution. The states of North Carolina and Rhode Island were not in the Union from the beginning. The former ratified the constitution in 1789, and the latter in 1790. *Black on Constitutional Laws, 41.*

### Records of the Constitutional Convention

The Constitutional Review thus makes reference to the most recent and exhaustive treaties and collection on this subject:

The Records of the Federal Convention of 1787. Edited by Max Farrand, Professor of History in Yale University. Three Volumes, Vol. I, pp. xxv, 606. Vol. II, pp. 667, Vol. III, pp. 685. New Haven: Yale University Press, 1911.

In compiling these three sumptuous volumes, Professor Farrand has admirably acquitted himself of a most laborious task, and has ren-

Its form is not wholly national, nor wholly republican, it is wholly neither, and partly both. Mr. Madison, in the Federalist, clearly defines its character and purposes.



dered a service to all students of the American constitutional system and to all future historians which deserves and will certainly receive their grateful appreciation. For he has here assembled all the available "source" material upon the constitutional convention of 1787, hitherto scattered through various printed volumes and some of it never before published, in what we must believe to be the final and definite work on the subject, since it is highly improbable that any further combing of the original materials would yield items of any importance, and since it would hardly be possible to improve on Professor Farrand's use and arrangement of his documents. *The Constitutional Review*, Vol. I, 58.

### **By Whom the Constitution Was Adopted or Ordained**

Mr. Calhoun thus shows that the States adopted it :

The usual form of expression used by some of the States is: "We, the delegates of the State," (naming the State) "do, in behalf of the people of the State, assent to, and ratify the said constitution." All use, "ratify," and all, except North Carolina, use, "assent to." The delegates of that State use, "adopt," instead of "assent to;" a variance merely in the form of expression, without in any degree, affecting the meaning. Ratification was, then, the act of the several States in their separate capacity. It was performed by delegates appointed expressly for the purpose. Each appointed its own delegates; and the delegates of each, acted in the name of, and for the State appointing them. Their act consisted in, "assenting to," or, what is the same thing, "adopting and ratifying" the constitution.

By turning to the seventh article of the constitution, and to the preamble, it will be found what was the effect of ratifying. The article expressly provides, that, "the ratification of the conventions of nine States, shall be sufficient for the establishment of this constitution, between the States so ratifying the same." The preamble of the Constitution is in the following words: "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America." The effect, then of its ratification was, to ordain and establish the constitution; and, thereby, to make, what was before but a plan. *1 Calhoun's Works*, pp. 126-7.

Mr. Calhoun's theory was that the Constitution was ordained by the States, through commissioners or delegates who were chosen by the people of the respective States, that the delegates so chosen acted by and in the names of their respective States. He also concluded that it was established for "The United States of America," that is, for the States composing the Union—to secure their common welfare and safety, as distinct and sovereign communities. He concedes, however, that it was not ordained and established over them, but between them. It was therefore a contract or compact, *between* them

as parties thereto, but not as a law *over* them. This was the great and distinguishing difference between Mr. Calhoun and his school, and Mr. Webster and his school.

Those who oppose this conclusion, and maintain the national character of the government, rely, in support of their views, mainly on the expressions, "we, the people of the United States," used in the first part of the preamble; and, "do ordain and establish this constitution for the United States of America," used in its conclusion. Taken together, they insist, in the first place, that, "we, the people," mean, the people in their individual characters, as forming a single community; and that, "the United States of America," designates them in their aggregate character, the American people. In maintaining this construction, they rely on the omission to enumerate the States by name, after the word "people," so as to make it read, "We, the people of New Hampshire, Massachusetts, &c.," as was done in the articles of the confederation, and, also, in signing the Declaration of Independence; and, instead of this, the simple use of the general term "United States." *1 Calhoun's Works, p. 132.*

In enumerating the objects for which the constitution was ordained and established, the preamble places at the head of the rest, as its leading object, "to form a more perfect union." So far, then, are the terms, "ordained and established," from being incompatible with the union, or having the effect of destroying it, the constitution itself declares that it was intended, "to form a more perfect union." *1 Calhoun's Works, pp. 135-6.*

It everywhere recognizes the existence of the States, and invokes their aid to carry its powers into execution. In one of the two houses of Congress, the members are elected by the legislatures of their respective States; and in the other, by the people of the several States, not as composing mere districts of one great community, but as distinct and independent communities. General Washington vetoed the first act apportioning the members of the House of Representatives among the several States, under the first census, expressly on the ground, that the act assumed as its basis, the former, and not the latter construction. The President and Vice-President are chosen by electors, appointed by their respective States; and, finally, the Judges are appointed by the President and the Senate; and, of course, as these are elected by the States, they are appointed through their agency. *1 Calhoun's Works, pp. 137-8.*

Mr. Calhoun further says:

The theory of the nationality of the government, is, in fact, founded on fiction. It is of recent origin. Few, even yet, venture to avow it to its full extent; while they entertain doctrines, which spring from, and must necessarily terminate in it. They admit that the people of the several States form separate, independent, and sovereign communities; and that, to this extent, the constitution is federal; but beyond this, and to the extent of the delegated powers—regarding them as forming one people or nation, they maintain that the constitution is national. *1 Calhoun's Works, p. 140.*

It is difficult to imagine how a doctrine so perfectly absurd, as that the States are federal as to the reserved, and national as to the delegated powers, could have originated; except through a misconception of the meaning of certain terms, sometimes used to designate the latter. They are sometimes called *granted* powers; and at others, are said to be powers *surrendered* by the States. When these expressions are used without reference to the fact, that all powers, under our system of government, are trust powers, they imply that the States have parted with such as are said to be granted or surrendered, absolutely and irrevocably. The case is different when applied to them as trust powers. They then become identical, in their meaning, with delegated powers; for to grant a power in trust, is what is meant by delegating it. It is not, therefore, surprising, that they who do not bear in mind that all powers of government are, with us, trust powers, should conclude that the powers said to be granted and surrendered by the States, are absolutely transferred from them to the government of the United States, as is sometimes alleged, or to the people as constituting one nation, as is more usually understood; and, thence, to infer that the government is national to the extent of the granted powers. *1 Calhoun's Works, pp. 142-3.*

Mr. Calhoun insisted that the constitution no more created a national government, than did the Articles of Confederation, but only made a more perfect union; and that after the Constitution was formed, each State retained all its original sovereignty, freedom and independence, that it did under the Confederation. That even as to the powers granted to the United States, they were granted only in trust for the States. In other words, that the grant was in trust, and not absolute—a grant by the States to the United States for the use and benefit of the States—a mere naked trust.

Mr. Calhoun claimed that the States have never parted absolutely with any of their sovereign powers; that the grants thereof contained in the Constitution, were only in trust for the States. He thus states his opinion:

That the articles of confederation, in delegating powers to the United States, did not intend to declare that the several States had parted with any portion of their sovereignty, is placed beyond doubt by the declaration contained in them, that, "each State retains its sovereignty, freedom, and independence;" and it may be fairly inferred, that the framers of the constitution, in borrowing this expression, did not design that it should bear a different interpretation.

If it be possible still to doubt that the several States retained their sovereignty and independence unimpaired, strong additional arguments might be drawn from various other portions of the instrument; especially from the third article, section third, which declares, that, "treason against the United States, shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort." It might be easily shown that, "the United States," mean here, as they do everywhere in the constitution, the several States in

their confederated character; that treason against them, is treason against their joint sovereignty, and, of course, as much treason against each State, as the act would be against any one of them, in its individual and separate character. *1 Calhoun's Works, pp. 149-150.*

He claimed that the States still retained their original unlimited sovereignty, and as proof of this, he relies upon that part of the Constitution which provides for amending it. That as the people of the several States have the right to amend or change, this is conclusive that the entire sovereign powers reside in them. He says:

By its provisions, Congress may propose amendments, on its own authority, by the vote of two-thirds of both houses; or it may be compelled to call a convention to propose them, by two-thirds of the legislatures of the several States; but, in either case, they remain, when thus made, mere proposals of no validity, until adopted by three-fourths of the States, through their respective legislatures; or by conventions, called by them for the purpose. *1 Calhoun's Works, p. 138.*

Mr. Madison, has said this upon the subject:

Much of the constitutional controversy which has prevailed has turned, as often happens, on the different ideas attached to the language employed, and would have been obviated by previous definitions of its terms. That the people of the United States formed the Constitution, will be denied or affirmed according to the sense in which the expression is understood. The main question is, whether they have not given to the charter a sanction in a capacity and a mode that shuts the door against all such disuniting and nullifying doctrines as those lately advanced. *4 Writings of Madison, p. 171.*

By the Hamiltonian School of Statesmen it is claimed that the Constitution was the product of one body politic—the whole mass of the people of the United States, giving the Federal Government the large powers contained therein and denying certain powers to the States, as well as certain others to the Federal Government; and that this body politic, the United States, ante-dated the States, and in effect created them, etc. The Jeffersonian School holds that the States, prior to the adoption of the Constitution, existed as independent sovereigns; that they created the Constitution by proposing it to the people of the several States, who ratified certain ones to the Federal Government, denied others to the States, reserving all others "to the States respectively, or to the people." *Tucker's Limitations on The Treaty-Making Power, 83.*

Judge Cooley strongly confirms this view:

"To ascertain whether any power assumed by the government of the United States is rightfully assumed, the Constitution is to be examined in order to see whether expressly or by fair implication the power has been granted, and if the grant does not appear, the assumption must be held unwarranted. To ascertain whether a State rightfully exercises a power, we have only to see whether by the Constitution of the United States it is conceded to the Union, or by that Constitution or that of the State prohibited to be exercised at all. The presumption must be



that the State rightfully does what it assumes to do, until it is made to appear how, by constitutional concessions, it has divested itself of the power, or by its own Constitution has for the time rendered the exercise unwarrantable." *Tucker's Limitations on The Treaty-Making Power*, 85.

The Convention of 1787 represented, not *the people of the United States* in mass, as has been absurdly contended by some political writers, but *the people* of the several States, as *States*—just as in the Congress of that period—Delaware, with her sixty-thousand inhabitants, having entire equality with Pennsylvania, which had more than four hundred thousand, or Virginia, with her seven hundred and fifty thousand.

The object for which they were appointed was not to organize a *new* Government, but "solely and expressly" to amend the "Federal Constitution" already existing; in other words, "to revise the Articles of Confederation," and to suggest such "alterations" or additional "provisions" as should be deemed necessary to render them "adequate to the exigencies of the Union." *Davis on The Rise and Fall of The Confederate Government*, Vol. I, 93.

The functions of the delegates to the Convention were, of course, only to devise, deliberate, and discuss. No validity could attach to any action taken, unless and until it should be afterward ratified by the several States. *Davis on The Rise and Fall of The Confederate Government*, Vol. I, 93, 94.

Luther Martin, a delegate from Maryland, in an account of its proceedings, afterward given to the Legislature of that State, classifies these differences as constituting three parties in the Convention, which he describes as follows:

"One party, whose object and wish it was to abolish and annihilate all State governments, and to bring forward one General Government over this continent of a monarchical nature, under certain restrictions and limitations. Those who openly avowed this sentiment were, it is true, but few; yet it is equally true that there was a considerable number, who did not openly avow it, who were, by myself and many others of the Convention, considered as being in reality favorers of that sentiment. . . .

"The second party was not for the abolition of the State governments nor for the introduction of a monarchical government under any form; but they wished to establish such a system as could give their own States undue power and influence in the government over the other States.

"A third party was what I considered truly federal and republican. This party was nearly equal in number with the other two, and was composed of the delegates from Connecticut, New York, New Jersey, Delaware, and in part from Maryland; also of some individuals from other representations. This party were for proceeding upon terms of federal equality; they were for taking our present federal system as the basis of their proceedings, and, as far as experience had shown that other powers were necessary to the Federal Government, to give those

powers. They considered this the object for which they were sent by their States, and what their States expected from them." *Davis on The Rise and Fall of The Confederate Government, Vol. I, 95.*

It must be conceded that the Constitution was formed by the thirteen States and not by the people of the United States at large. The delegates were in some cases elected by the people of the different States, and in others appointed by their respective legislatures. They voted in the Convention by States and not as individuals. The object of the ratification by the people of the several States was because it was deemed that the legislatures had no power under their respective constitutions to delegate or grant away any power vested in them by the ratification of the Constitution. These facts are plain to every student of the history of the appointment of the delegates to the Federal Convention, the proceedings of that Convention, and the ratification of the Constitution by the thirteen States.

Mr. Madison gives the clearest insight into the question as to whether it was framed by the States or the people of the United States. He says:

True it is, that the federal compact was not formed by individuals as the parties—that is, by the people acting as a single community. It was formed, nevertheless, by the people acting as separate communities, in their sovereign and highest capacity; a capacity in which, if they had so willed, they could have made themselves a single community, or have reduced their confederate system into an ordinary league or alliance; and the authority which could have done the former, could certainly take the middle course, which was taken in establishing the existing Constitution. In a word, the constitutional compact being formed by an authority perfectly competent, its *obligatory* and *operative* character must be the same as if it had been formed in any other mode by an authority not more competent; and while undissolved by consent or by force, it must be executed, within the extent of its granted powers, according to the forms and provisions prescribed in it, without reference to the mode of its formation. In the event of a dissolution of the compact, a distinctive effect would be, that the States would fall back into their character of single and separate communities; whereas a dissolution of the social compact on which single communities are founded, would have the effect of restoring or reducing individuals to a state of nature. *4 Writings of Madison, pp. 240-241.*

### Those Who Made the Constitution

Mr. Bryce thus speaks of Washington and Hamilton:

Washington is, indeed, a far more perfect character. Washington stands alone and unapproachable, like a snow-peak rising above its fellows into the clear air of morning, with a dignity, constancy, and purity which have made him the ideal type of civic virtue to succeeding generations. No greater benefit could have befallen the republic than to have such a type set from the first before the eye and mind of the people. But Hamilton, of a virtue not so flawless, touches us more nearly, not only by the romance of his early life and his tragic death, but by a certain ardour and impulsiveness, and even tenderness of soul,

joined to a courage equal to that of Washington himself. Equally apt for war and for civil government, with a profundity and amplitude of view rare in practical soldiers or statesmen, he stands in the front rank of a generation never surpassed in history, a generation which includes Burke and Fox and Pitt and Grattan, Stein and Hardenberg and William von Humboldt, Wellington and Napoleon, Talleyrand, who seems to have felt for him something as near affection as that cold heart could feel, said, after knowing all the famous men of the time, that only Fox and Napoleon were Hamilton's equals, and that he had divined Europe, having never seen it. *Bryce's American Commonwealth*, Vol. I, 641.

It is remarkable that two of the strongest men in the Convention were, as not being native Americans, far less influenced than most of their colleagues by local and State feeling, and therefore threw the whole weight of their intellect and influence into the national scale. These were Alexander Hamilton, born a West Indian, the son of a Scotch father and a French mother, and James Wilson, an immigrant from Scotland. The speeches of the latter (a lawyer in Philadelphia, and afterwards a justice of the Supreme Federal Court) in the Pennsylvania ratifying Convention, as well as in the great Convention of 1787, display an amplitude and profundity of view in matters of constitutional theory which place him in the front rank of the political thinkers of his age. Wilson, who was born about 1742 and died in 1792, is one of the luminaries of the time to whom, as to the still greater and far more brilliant Hamilton, subsequent generations of Americans have failed to do full justice. *Bryce's American Commonwealth*, Vol. I, 665, note.

### **The Friends and Enemies of the Constitution**

Of the effect which parties played in framing the Constitution Mr. Jefferson said in 1812. among other things:

Among that section of our citizens called federalists, there are three shades of opinion. Distinguishing between the *leaders* and *people* who compose it, the *leaders* consider the English constitution as a model of perfection, some, with a correction of its vices, others, with all its corruptions and abuses. This last was Alexander Hamilton's opinion, which others, as well as myself, have often heard him declare, and that a correction of what are called its vices, would render the English an impracticable government. This government they wished to have established here, and only accepted and held fast, *at first*, to the present constitution, as a stepping-stone to the final establishment of their favorite model. This party has therefore always clung to England as their prototype, and great auxiliary in promoting and effecting this change. *13 Jefferson's Writings*, (*mem. ed.*), p. 209.

The party called republican is steadily for the support of the present constitution. They obtained at its commencement, all the amendments to it they desired. These reconciled them to it perfectly, and if they have any ulterior view, it is only, perhaps, to popularize it further, by shortening the Senatorial term, and devising a process for the respon-

sibility of judges, more practicable than that of impeachment. They esteem the people of England and France equally, and equally detest the governing powers of both.

This I verily believe, after an intimacy of forty years with the public councils and characters, is a true statement of the grounds on which they are at present divided, and that it is not merely an ambition for power. An honest man can feel no pleasure in the exercise of power over his fellow citizens. *13 Jefferson's Writings (mem. ed.), pp. 210-211.*

You expected to discover the difference of our party principles in General Washington's valedictory, and my inaugural address. Not at all. General Washington did not harbor one principle of federalism. He was neither an Angloman, a monarchist, nor a separatist. He sincerely wished the people to have as much self-government as they were competent to exercise themselves. The only point on which he and I ever differed in opinion was, that I had more confidence than he had in the natural integrity and discretion of the people, and in the safety and extent to which they might trust themselves with a control over their government. He has asservated to me a thousand times his determination that the existing government should have a fair trial, and that in support of it he would spend the last drop of his blood. He did this the more repeatedly, because he knew General Hamilton's political bias, and my apprehensions from it. It is a mere calumny, therefore, in the monarchists, to associate General Washington with their principles. *13 Jefferson's Writings, (mem. ed.), p. 212.* Yet Jefferson's enemies say he was a traitor to Washington and the Constitution.

In writing to Mr. Everett as to his work on America, Madison says:

One error into which the author has been led will, I am sure, be gladly corrected. On page 109 it is said of Washington that he "appears to have wavered for a moment in making up his mind upon the Constitution." I can testify, from my personal knowledge, that no member of the Convention appeared to sign the Instrument with more cordiality than he did, nor to be more anxious for its ratification. I have, indeed, the most thorough conviction, from the best evidence, that he never wavered in the part he took in giving it his sanction and support. *3 Writings of Madison, p. 584.*

### The Makers of the Constitution

At the head of the illustrious men who framed and signed it, men who have earned the eternal gratitude of their country, stands the name of GEORGE WASHINGTON, "President and Deputy from Virginia;" a name at the utterance of which envy is dumb, and pride bows with involuntary reverence; and piety, with eyes lifted to Heaven, breathes forth a prayer of profound gratitude. *Story on the Constitution, Vol. V, p. 620, § 1856.*

The Constitutional Review, in its review of Prof. Farrand's book, *The Framing of the Constitution*, says:

Here we see the august Washington, carefully abstaining from participation in the debates, even when the convention sat in committee of



the whole, lest his immense influence should overawe the other delegates, yet unable to wholly suppress his smiles or frowns as he favored or disapproved the proposals brought forward. Here also we have pictures of the venerable and philosophic Franklin, casting counsels of moderation upon the stormy waters of debate; of Madison, the methodical, learned, and industrious, the scholar in politics, yet more than anyone else the father of the Constitution; of the small and tense frame of Hamilton, the aristocrat, as he delivered his one great speech in the convention; of Luther Martin, able and (as some thought) unscrupulous, inconceivably tedious and prolix, and yet the author of the "supreme law of the land" clause; of the brilliant and slightly presumptuous youth from South Carolina, Charles Pinckney; of William Pierce of Georgia, that most excellent "mixer," blessed with a sense of humor, who placed posterity under an obligation by recording in familiar phrases his personal impressions of all his fellow delegates; and of those gifted men and solid citizens Mason, King, Ellsworth, Sherman, Gerry, Wilson, Randolph and the two Morrisises. *The Constitutional Review, Vol. I, 60-1.*

### **Motives Which Inspired the Makers of the Constitution**

Mr. Madison thus states some of them.

The most of us carried into the Convention a profound impression, produced by the experienced inadequacy of the old Confederation, and by the monitory examples of all similar ones, ancient and modern, as to the necessity of binding the States together by a strong Constitution, is certain. The necessity of such a Constitution was enforced by the gross and disreputable inequalities which had been prominent in the internal administrations of most of the States. Nor was the recent and alarming insurrection, headed by Shays, in Massachusetts, without a very sensible effect on the public mind. Such, indeed, was the aspect of things, that, in the eyes of all the best friends of liberty, a crisis had arrived which was to decide whether the American experiment was to be a blessing to the world, or to blast forever the hopes which the republican cause had inspired; and what is not to be overlooked, the disposition to give to a new system all the vigor consistent with Republican principles was not a little stimulated by a backwardness in some quarters towards a Convention for the purpose, which was ascribed to a secret dislike to popular Government, and a hope that delay would bring it more into disgrace, and pave the way for a form of Government more congenial with monarchical or aristocratical predilections. 3 *Writings of Madison, p. 244.*

For myself, having, from the first moment of maturing a political opinion down to the present one, never ceased to be a votary of the principle of self-government, I was among those most anxious to rescue it from the danger which seemed to threaten it; and with that view, was willing to give to a Government resting on that foundation as much energy as would insure the requisite stability and efficacy. It is possible, that in some instances this consideration may have been allowed a weight greater than subsequent reflection within the Convention, or the actual operation of the Government, would sanction. It may be remarked, also, that it sometimes happened, that opinions as to a par-

ticular modification or a particular power of the Government had a conditional reference to others, which, combined therewith, would vary the character of the whole.

But whatever might have been the opinions entertained in forming the Constitution, it was the duty of all to support it in its true meaning, as understood *by the nation* at the time of its ratification. No one felt this obligation more than I have done; and there are few, perhaps, whose ultimate and deliberate opinions on the merits of the Constitution accord in a greater degree with that obligation.

The departures from the true and fair construction of the instrument have always given me pain, and always experienced my opposition when called for. *3 Writings of Madison, p. 245.*

### The Character and Nature of the Constitution

Mr. Jefferson who took but little part in the making of the Constitution, because he was then absent as Minister to France, has said of its formation:

"The example of changing a constitution by assembling the wise men of the State, instead of assembling armies, will be worth as much to the world as the former examples we had given them. The Constitution too, which was the result of our deliberations, is, undoubtedly, the wisest ever yet presented to men." *3 Works, 12. Miller's Const. Note, pp. 59-60.*

Mr. Jefferson thus spoke of it:

Where a constitution, like ours, wears a mixed aspect of monarchy and republicanism, its citizens will naturally divide into two classes of sentiment, according as their tone of body or mind, their habits, connections and callings, induce them to wish to strengthen either the monarchical or the republican features of the constitution. Some will consider it as an elective monarchy, which had better be made hereditary, and therefore endeavor to lead towards that all the forms and principles of its administration. Others will view it as an energetic republic, turning in all its points on the pivot of free and frequent elections. The great body of our native citizens are unquestionably of the republican sentiment. Foreign education, and foreign connections of interest, have produced some exceptions in every part of the Union, north and south. *9 Jefferson's Writings, (mem. ed.), pp. 377-8.*

Much as I abhor war, and view it as the greatest scourge of mankind, and anxiously as I wish to keep out of the broils of Europe, I would yet go with my brethren into these, rather than separate from them. *9 Jefferson's Writings, (mem. ed.), p. 385.*

The following is Mr. Jefferson's views of our Constitution and our government, which in the opinion of the writer are ideal:

I do then, with sincere zeal, wish an inviolable preservation of our present federal Constitution, according to the true sense in which it was adopted by the States, that in which it was advocated by its friends, and not that which its enemies apprehended, who therefore became its enemies; and I am opposed to the monarchising its features by the

forms of its administration, with a view to conciliate a first transition to a President and Senate for life, and from that to an hereditary tenure of these offices, and thus to worm out the elective principle. I am for preserving to the States the powers not yielded by them to the Union, and to the legislature of the Union its constitutional share in the division of powers; and I am not for transferring all the powers of the States to the General Government, and all those of that government to the executive branch. I am for a government rigorously frugal and simple, applying all the possible savings of the public revenue to the discharge of the national debt; and not for a multiplication of officers and salaries merely to make partisans, and for increasing, by every device, the public debt, on the principle of its being a public blessing. I am for relying, for internal defence, on our militia solely, till actual invasion, and for such a naval force only as may protect our coasts and harbors from such depredations as we have experienced; and not for a standing army in time of peace, which may overawe the public sentiment; nor for a navy, which, by its own expenses and the eternal wars in which it will implicate us, will grind us with public burthens, and sink us under them. I am for free commerce with all nations; political connection with none; and little or no diplomatic establishment. And I am not for linking ourselves by new treaties with the quarrels of Europe; entering that field of slaughter to preserve their balance, or joining in the confederacy of kings to war against the principles of liberty. I am for freedom of religion, and against all manœuvres to bring about a legal ascendancy of one sect over another: for freedom of the press, and against all violations of the Constitution to silence by force and not by reason the complaints or criticisms, just or unjust, of our citizens against the conduct of their agents. And I am for encouraging the progress of science in all its branches; and for raising a hue and cry against the sacred name of philosophy; for awing the human mind by stories of raw-head and bloody bones to a distrust of its own vision, and to repose implicitly on that of others; to go backwards instead of forwards to look for improvement; to believe that government, religion, morality, and every other science were in the highest perfection in ages of the darkest ignorance, and that nothing can ever be devised more perfect than what was established by our forefathers. To these I will add, that I was a sincere well-wisher to the success of the French revolution, and still wish it may end in the establishment of a free and well-ordered republic; but I have not been insensible under the atrocious depredations they have committed on our commerce." *10 Jefferson's Writings, (mem. ed.), pp. 76-77-78.*

Oh, if the Constitution could have been interpreted as Mr. Jefferson interpreted it and could have been preserved as he hoped it would, how much better it would have been for us and the world!

If we could only have kept out of the European quarrels as he hoped we would, a change of events would have occurred. If we could only have followed the advice of the above letter of Jefferson and the farewell address of Washington as to no

entangling alliances with foreign nations, how much better it would have been for us as a people, but whether it would have been better for the world or not, time can only tell.

What would Washington and Jefferson have advised had they lived in 1914 to 1918, instead of when they did? No one can know, and time only can tell whether we chose ill or well in the course we pursued. Of course, our leaders believed they acted wisely; no unbiased mind can doubt the motive or intentions that controlled the leaders and they have been supported by the people as never before.

### **Is the Constitution a Mere Compact Between the States?**

The doctrine for and against the proposition, and the reasons for holding to the one or the other, is possibly best and most forcefully stated by Messrs. Hayne and Webster in their great debate on the Foote Resolution, which had nothing to do with the subjects discussed, the right of secession, and nullification, the tariff and the author of the great Ordinance of 1787. Most all that can be said on these subjects is there well said.

Mr. Webster thus states some of his reasons:

So much, sir, for the argument, even if the premises of the gentleman were granted, or could be proved. But, sir, the gentleman has failed to maintain his leading proposition. He has not shown, it can not be shown, that the Constitution is a compact between State governments. The Constitution itself, in its very front refutes that idea; it declares that it is ordained and established *by the people of the United States*. So far from saying that it is established by the governments of the several States, it does not even say that it is established by the people of the several States; but it pronounces that it is established by the people of the United States, in the aggregate. The gentleman says, it must mean no more than the people of the several States, taken collectively, constitute the people of the United States; but it is in this, their collective capacity, it is as all the people of the United States, that they establish the Constitution. So they declare; the words can not be plainer than the words used. 3 *Webster's Works*, (7th ed.), p. 346.

Mr. Webster later probably changed his views on the subject of the Constitution being a compact. He never did become a convert to the doctrine of nullification or secession, but he did affirm that the causes which led to Secession would be a just and sufficient cause for revolution. See his speech<sup>1</sup> at Capon Springs, Va., where he said:

<sup>1</sup>Mr. Webster was much censured for this and other similar speeches by many of his constituents in Boston and other Eastern cities. The Board of Aldermen of Boston refused the use of Faneuil Hall as a place of reception

to be given him. The act, however, was regretted, and its use was later granted and accepted. Curtis on The Life of Daniel Webster, Vol. II, pp. 499-500.



"If large portions of public bodies, against their duties and their oaths, will refuse to execute the Constitution, and do, in fact, prevent such execution, no remedy seems to lie by any application to the Supreme Court. The case now before the country clearly exemplifies my meaning. Suppose the North to have decided majorities in Congress, and suppose these majorities persist in refusing to pass laws for carrying into effect the clause of the Constitution which declares that fugitive slaves shall be restored, it would be evident that no judicial process could compel them to do their duty, and what remedy would the South have?"

Note.—There is no doubt that some of the northern States, and many large public bodies did refuse to obey or execute that part of the Constitution which related to slavery.

"How absurd it is to suppose that, when different parties enter into a compact for certain purposes, either can disregard any one provision, and expect, nevertheless, the other to observe the rest! I intend, for one, to regard, and maintain, and carry out, to the fullest extent, the Constitution of the United States, which I have sworn to support in all its parts and all its provisions." *Curtis on The Life of Daniel Webster*, Vol. II, 518.

"I have not hesitated to say, and I repeat, that if the Northern States refuse, wilfully and deliberately, to carry into effect that part of the Constitution which respects the restoration of fugitive slaves, and Congress provide no remedy, the South would no longer be bound to observe the compact. A bargain can not be broken on one side, and still bind the other side. I say to you, gentlemen, in Virginia, as I said on the shores of Lake Erie and in the city of Boston, as I may say again in that city or elsewhere in the North, that you in the South have as much right to receive your fugitive slaves as the North has to any of its rights and privileges or navigation and commerce. I desire to be understood here among you, and throughout the country, that in hopes, thoughts, and feelings, I profess to be an American—altogether and nothing but an American—and that I am for the Constitution, and the whole Constitution. I am ready to fight and fall for the constitutional rights of Virginia as I am for those of Massachusetts. I pour out to you, gentlemen, my whole heart, and I assure you these are my sentiments. I would no more see a feather plucked unjustly from the honor of Virginia than I would see one so plucked from the honor of Massachusetts." *Curtis on The Life of Daniel Webster*, Vol. II, 519.

Mr. Calhoun claimed that the Constitution, so far as the States were concerned, was a mere contract, and not a law; but that as to the people or citizens of the States, it was a law. That the States could violate it as a contract, but not as a law. He says:

But, as solemn and sacred as it is, and as high as the obligations may be which it imposes, still it is but a *compact* and not a *Constitution*, regarded in reference to the people of the several States, in their sovereign capacity. To use the language of the constitution itself, it was ordained as a "constitution for the United States," not *over* them; and established, not *over* but "*between* the States ratifying it:" and

hence, a State acting in its sovereign capacity, and in the same manner in which it ratified and adopted the constitution, may be guilty of violating it as a *compact*, but can not be guilty of violating it as a *law*. The case is the reverse, as to the action of its citizens, regarding them in their individual capacity. To them it is a law, the supreme law within its sphere. They may be guilty of violating it *as a law*, or of violating the laws and treaties made in pursuance of, or under its authority, regarded as laws or treaties; but can not be guilty of violating it as a *compact*. The constitution was ordained and established *over them* by their respective States, to whom they owed allegiance; and they are under the same obligation to respect and obey its authority, within its proper sphere, as they are to respect and obey their respective State constitutions; and for the same reason, viz: that the State to which they owe allegiance, commanded it in both cases. *1 Calhoun's Works, pp. 276-277.*

In 1833 Mr. Calhoun, submitted to the Senate of the United States, a resolution which states fully and succinctly the theory of government which was held by him and his school. The resolution was as follows:

“Resolved, That the people of the several States composing these United States are united as parties to a constitutional compact, to which the people of each State acceded as a separate sovereign community, each binding itself by its own particular ratification; and that the union of which the said compact is the bond, is a union *between the States* ratifying the same.

“Resolved, That the people of the several States thus united by the constitutional compact, in forming that instrument, and in creating a general government to carry into effect the objects for which they were formed, delegated to that government, for that purpose, certain definite powers, to be exercised jointly, reserving, at the same time, each State to itself, the residuary mass of powers, to be exercised by its own separate government; and that whenever the general government assumes the exercise of powers not delegated by the compact, its acts are unauthorized, and are of no effect; and that the same government is not made the final judge of the powers delegated to it, since that would make its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among sovereign parties, without any common judge, each has an equal right to judge for itself, as well of the infraction as of the mode and measure of redress.

“Resolved, That the assertions, that the people of these United States, taken collectively as individuals, are now, or ever have been, united on the principle of the social compact, and, as such, are now formed into one nation or people, or that they have ever been so united in any one stage of their political existence; that the people of the several States composing the Union have not, as members thereof, retained their sovereignty; that the allegiance of their citizens has been transferred to the general government; that they have parted with the right of punishing treason through their respective State governments; and that they have not the right of judging in the last resort as to the extent of the powers reserved, and of consequence of those delegated,

are not only without foundation in truth, but are contrary to the most certain and plain historical facts, and the clearest deductions of reason; and that all exercise of power on the part of the general government, or any of its departments, claiming authority from such erroneous assumptions, must of necessity be unconstitutional, must tend, directly and inevitably, to subvert the sovereignty of the States, to destroy the federal character of the Union, and to rear on its ruins a consolidated government, without constitutional check or limitation, and which must necessarily terminate in the loss of liberty itself." 3 *Webster's Works* (7th ed.), pp. 448-449.

Mr. Webster in reply to Mr. Calhoun's speech on the subject said:

Among the feelings which at this moment fill my breast, not the least is that of regret at the position in which the gentleman has placed himself. Sir, he does himself no justice. The cause which he has espoused finds no basis in the Constitution, no succor from public sympathy, no cheering from a patriotic community. He has no foothold on which to stand while he might display the powers of his acknowledged talents. Everything beneath his feet is hollow and treacherous. He is like a strong man struggling in a morass; every effort to extricate himself only sinks him deeper and deeper. And I fear the resemblance may be carried still farther; I fear that no friend can safely come to his relief, that no one can approach near enough to hold out a helping hand, without danger of going down himself, also, into the bottomless depths of this Serbonian bog.

The honorable gentleman has declared, that on the decision of the question now in debate may depend the cause of liberty itself. I am of the same opinion; but then, Sir, the liberty which I think is staked on the contest is not political liberty, in any general and undefined character, but our own well-understood and long-enjoyed *American* liberty. 3 *Webster's Works* (7th ed.), pp. 449, 450.

Mr. Webster further said:

Mr. President, if the honorable member will truly state what the people did in forming the Constitution, and then state what they must do if they would now undo what they then did, he will unavoidably state a case of revolution. Let us see if it be not so. He must state, in the first place, that the people of the several States adopted and ratified this Constitution, or form of government; and, in the next place, he must state that they have a right to undo this; that is to say, that they have a right to discard the form of government which they have adopted and to break up the Constitution which they have ratified. Now, Sir, this is neither more nor less than saying that they have a right to make a revolution. To reject an established government, to break up a political constitution, is revolution.

I deny that any man can state accurately what was done by the people, in establishing the present Constitution, and then state accurately what the people, or any part of them, must now do to get rid of its obligations, without stating an undeniable case of the overthrow of government. I admit, of course, that the people may, if they choose, overthrow the government. But, then, that is revolution. The doctrine

now contended for is, that, by *nullification or secession*, the obligations and authority of the government may be set aside or rejected without revolution. But that is what I deny; and what I say, is, that no man can state the case with historical accuracy, and in constitutional language, without showing that the honorable gentleman's right, as asserted in his conclusion, is a revolutionary right merely; that it does not and can not exist under the Constitution, or agreeably to the Constitution, but can come into existence only when the Constitution is overthrown.<sup>1</sup> *3 Webster's Works, (7th. ed.), p. 456.*

Mr. Webster, in his rejoinder to Mr. Hayne, on the 27th of January, 1830, said:

"When the gentleman says the Constitution is a compact between the States, he uses language exactly applicable to the old Confederation. He speaks as if he were in Congress before 1789. He describes fully that old state of things then existing. The Confederation was, in strictness, a compact; the States, as States, were parties to it. We had no other General Government. But that was found insufficient and inadequate to the public exigencies. The people were not satisfied with it, and undertook to establish a better. They undertook to form a General Government, which should stand on a new basis—not a confederacy, not a league, not a compact between the States, but a Constitution."

Again, in his discussion with Mr. Calhoun, three years afterward, he vehemently reiterates the same denial. Of the Constitution, he says: "Does it call itself a compact? Certainly not. It uses the word 'compact' but once, and that when it declares that the States shall enter into no compact. Does it call itself a league, a confederacy, a subsisting treaty between the States? Certainly not. There is not a particle of such language in all its pages." *Davis on The Rise and Fall of The Confederate Government, Vol. I, 135.*

Mr. Webster says:

"This is the reason, sir, which makes it necessary to abandon the use of constitutional language for a new vocabulary, and to substitute, in the place of plain, historical facts, a series of assumptions. This is the reason why it is necessary to give new names to things; to speak of the Constitution, not as a constitution, but as a compact; and of the ratifications by the people, not as ratifications, but as acts of accession."

In these and similar passages, Mr. Webster virtually concedes that, if the Constitution were a compact; if the Union were a *confederacy*; if the States had, as States, severally acceded to it—all which propositions he denies—then the sovereignty of the States and their right to secede from the Union would be deducible.

Now, it happens that these very terms—"compact," "confederacy," "accede," and the like—were the terms in familiar use by the authors of the Constitution and their associates with reference to that instrument and its ratification. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 137.*

<sup>1</sup>Mr. Webster probably modified his views as to the nature of the Constitution but never did as to the right of secession or nullification, though his enemies claimed that he had a change

of heart as to the right of secession. See his own letters and speeches on the subject. <sup>2</sup>Curtis' Life of Webster, 518, et seq.



Mr. Gouverneur Morris, one of the most pronounced advocates of a strong central government, in the Convention, said: "He came here to form a *compact* for the good of Americans. He was ready to do so with all the States. He hoped and believed they would all enter into such a *compact*. If they would not, he would be ready to join with any States that would. But, as the *compact* was to be voluntary, it is in vain for the Eastern States to insist on what the Southern States will never agree to."

Mr. Madison, while inclining to a strong government, said:

"In the case of a union inclining to a strong Constitution, the nature of *the pact* has always been understood," etc.

Mr. Hamilton, in the "Federalist," repeatedly speaks of the new government as a "*confederate republic*" and a "*confederacy*," and calls the Constitution a "*compact*." (See especially Nos. IX and LXXXV of the Federalist.)

General Washington—who was not only the first President under the new Constitution, but who had presided over the Convention that drew it up—in letters written soon after the adjournment of that body to friends in various States, referred to the Constitution as a *compact* or treaty, and repeatedly uses the terms "accede" and "accession," and once the term "secession."

He asks what the opponents of the Constitution in Virginia would do, "if nine other States should accede to the Constitution."

Luther Martin, of Maryland, informs us that, in a committee of the General Convention of 1787, protesting against the proposed violation of the principles of the "perpetual union" already formed under the Articles of Confederation, he made use of such language as this:

"Will you tell us we ought to trust you because you now enter into a solemn *compact* with us? This you have done before, and now treat with the utmost contempt. Will you now make an appeal to the Supreme Being, and call of Him to guarantee you observance of this *compact*? The same you have formerly done for your observance of the Articles of Confederation, which you are now violating in the most wanton manner." *Davis on The Rise and Fall of The Confederate Government, Vol. I, 137-8.*

Mr. Madison in a letter to Mr. Webster,<sup>1</sup> thus explains the character and nature of the compact:

The only distinctive effect between the two modes of forming a Constitution by the authority of the people, is, that if formed by them as embodied into separate communities, as in the case of the Constitution of the United States, a dissolution of the Constitution compact would replace them in the condition of separate communities, that being the condition in which they entered into the compact; whereas, if formed by the people as one community, acting as such by a numerical majority, a dissolution of the compact would reduce them to a state or nature, as so many individual persons. But while the constitutional compact remains undissolved, it must be executed according to

<sup>1</sup>Mr. Webster often declared that Mr. Madison's writings converted him as to the tariff question, and it may be that the same writings converted him as to the question of the Constitution

being a compact. Messrs. Jefferson, Madison and Webster seemed to belong to a mutual admiration society, though in part to different political parties.

the forms and provisions specified in the compact. It must not be forgotten that compact, express or implied, is the vital principle of free governments as contradistinguished from governments not free; and that a revolt against this principle leaves no choice but between anarchy and despotism. *4 Writings of Madison, p. 294.*

### Character and Nature of Federal Constitution.

The Constitution of the United States is not a compact, league, or treaty between the several States of the Union, but an organic, fundamental law, ordained and adopted by the people of the United States, establishing a national federal government.<sup>1</sup> *Black on Constitutional Law, 39.*

Whether the Constitution, as it has divided the powers of Government between the States in their separate and in their united capacities, tends to an oppressive aggrandizement of the General Government,<sup>2</sup> or to an anarchial independence of the State Governments, is a problem which time alone can absolutely determine. It is much to be wished that the division as it exists, or may be made with the regular sanction of the people, may effectually guard against both extremes; for it can not be doubted that an accumulation of all power in the General Government would as naturally lead to a dangerous accumulation in the Executive hands, as that the resumption of all power by the several States would end in the calamities incident in lessening the security for sound principles of administration within each of them.

There have been epochs when the General Government was evidently drawing a disproportion of power into its vortex. There have been others, when States threatened to do the same. At the present moment, it would seem that both are aiming at encroachments, each condition and temper of the community, the General Government can not long succeed in encroachments contravening the will of a majority of the States and of the people. *3 Writings of Madison, p. 246.*

### Differences Between British and American Constitutions.

The one is unwritten, the other is written; the one is changeable, the other unchangeable, except as the people themselves may change it in the mode prescribed by the Constitution itself. The government itself may change the one at its pleasure, while the people, the body politic alone can change the other in the manner prescribed. Strictly speaking, Great Britain has no Constitution in the sense the term is used in America. Mr. Dicey and Mr. Bryce, two English writers, well state the differences between the two.

<sup>1</sup>This is probably the modern view of the majority of text-writers and constitutional lawyers, but it was not always so, and probably not the views of any of the men who helped to make it or participated in its ratification.

<sup>2</sup>The tendency for the last half century has been for a strong central government; and for weak State govern-

ments. The tendency is not only manifested by acts of Congress and the executive departments to usurp and exercise powers reserved to the States, but by the States and the people themselves, in amending the Constitution, and in nearly every instance, it was to take powers and rights from the States and the people, and confer them upon the central government.

Mr. Bryce thus compares ours with his :

In England and many other modern States there is no difference in authority by the legislature; all can be changed by the legislature. What are called in England constitutional statutes, such as Magna Charta, the Bill of Rights, the Act of Settlement, the Acts of Union with Scotland and Ireland, are merely ordinary laws, which could be repealed by Parliament at any moment in exactly the same way as it can repeal a highway act or lower the duty on tobacco. The habit has grown up of talking of the British Constitution as if it were a fixed and definite thing. But there is in England no such thing as a Constitution apart from the rest of the law; there is merely a mass of law, consisting partly of statutes and partly of decided cases and accepted usages, in conformity with which the government of the country is carried on from day to day, but which is being constantly modified by fresh statutes and cases. The same thing existed in ancient Rome, and everywhere in Europe a century ago. It is, so to speak, the "natural," and used to be the normal, condition of things in all countries, free or despotic.

The condition of America is wholly different. There the name Constitution designates a particular instrument adopted in 1789, amended in some points since, which is the foundation of the national government. This Constitution was ratified and made binding, not by Congress, but by the people acting through conventions assembled in the thirteen States which then composed the Confederation. It created legislature of two houses; but that legislature, which we call Congress, has no power to alter it in the smallest particular. That which the people have enacted, the people only will alter or repeal.

Here therefore we observe two capital differences between England and the United States. The former has left the outlines as well as the details of her system of government to be gathered from a multitude of statutes and cases. The latter has drawn them out in one comprehensive fundamental enactment. The former has placed these so-called constitutional laws at the mercy of her legislature, which can abolish when it pleases any institution of the country, the Crown, the House of Lords, the Established Church, the House of Commons, Parliament itself. The latter has placed her Constitution altogether out of the reach of Congress, providing a method of amendment whose difficulty is shown by the fact that it has been very sparingly used.

In England Parliament is omnipotent. In America Congress is doubly restricted. It can make laws for only certain purposes specified in the Constitution, and in legislating for these purposes it must not transgress any provision of the Constitution itself. The stream can not rise above its source. *Bryce on American Commonwealth, Vol. I, 237-8.*

In America the supreme law-making power resides in the people. Whatever they enact binds all courts whatsoever. All other law-making bodies are subordinate, and the enactments of such bodies must conform to the supreme law, else they will perish at its touch, as a fishing smack goes down before an ocean steamer. And these subordinate enactments, if at variance with the supreme law, are invalid from the first, although their invalidity may remain for years unnoticed or unproved. It can be proved only by the decision of a court in a case

which raises the point for determination. The phenomenon can not arise in a country whose legislature is omnipotent, but naturally arises wherever we find a legislature limited by the superior authority, such as a constitution which the legislature can not alter.

In England the judges interpret Acts of Parliament exactly as American judges interpret statutes coming before them. If they find an Act conflicting with a decided case, they prefer the Act to the case, as being of higher authority. As between two conflicting Acts, they prefer the latter." *Bryce's American Commonwealth, Vol. I, 245.*

The march of democracy in England has disposed English writers and politicians of the very school which thirty or twenty years ago pointed to America as a terrible example, now to discover that her republic possesses elements of stability wanting in the monarchy of the mother country. They lament that England should have no supreme court. Some have even suggested that England could create one. They do not seem to perceive that the dangers they discern arise not from the want of a court but from the omnipotence of the British Parliament. They ask for a court to guard the British Constitution, forgetting that Britain has no constitution, in the American sense, and never had one, except for a short space under Oliver Cromwell. The strongest court that might be set up in England could effect nothing so long as Parliament retains its power to change every part of the law, including all the rules and doctrines that are called constitutional. If Parliament were to lose that power there would be no need to create a supreme court, because the existing judges of the land would necessarily discharge the very functions which the American judges now discharge. *Bryce's American Commonwealth, Vol. I, 249.*

James Wilson of Pennsylvania was one of the deepest thinkers and most exact reasoners among the members of the Convention of 1787. Speaking of the State constitutions, he remarked in the Pennsylvania Convention of 1788: "Perhaps some politician who has not considered with sufficient accuracy our political system would observe that in our governments the supreme power was vested in the constitutions. This opinion approaches the truth, but does not reach it. The truth is that in our governments the supreme, absolute, and uncontrollable power *remains* in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions." *Elliot's Debates, ii. 432. Bryce's American Commonwealth, Vol. I, 250, note.*

The Constitution of England is contained in hundreds of volumes of statutes and reported cases; the Constitution of the United States (including the amendments) may be read through aloud in twenty-three minutes. It is about half as long as St. Paul's first Epistle to the Corinthians, and only one fortieth part as long as the Irish Land Act of 1881. History knows few instructions which in so few words lay down equally momentous rules on a vast range of matters of the highest importance and complexity. *Bryce's American Commonwealth, Vol. I, 363.*

It resembles theological writings in this, that both, while taken to be immutable guides, have to be adapted to a constantly changing world, the one to political conditions which vary from year to year and never return to their former state, the other to new phases of



thought and emotion, new beliefs in the realms of physical and ethical physiosophy. There must, therefore, be a development in constitutional formulas, just as there is in theological. It will come, it can not be averted, for it comes in virtue of a law of nature; all that men can do is to shut their eyes to it, and conceal the reality of change under the continued use of time-honored phrases, trying to persuade themselves that these phrases mean the same thing to their minds to-day as they meant generations or centuries ago. As a great and living theologian says, "In a higher world it is otherwise; but here below to live is to change, and to be perfect is to have changed often."

The Constitution of the United States is so concise and so general in its terms, that even had America been as slowly moving a country as China, many questions must have arisen on the interpretation of the fundamental law which would have modified its aspect. But America has been the most swiftly expanding of all countries. Hence the question that has presented itself has often related matters which the framers of the Constitution could not have contemplated. *Bryce's American Commonwealth, Vol. I, 364.*

### **The United States Constitution Compared With Others.**

Mr. Justice Miller thus compares it:

This instrument comes nearer than any of political origin to Rousseau's idea of a society founded on social contract. In its formation, States and individuals, in the possession of equal rights—the rights of human nature common to all—met together and deliberately agreed to give up certain of those rights to government for the better security of others; and that there might be no mistake about this agreement it was reduced to writing, with all the solemnities which give sanction to the pledges of mankind.

Other nations speak of their constitutions, which are the growth of centuries of government, and the maxims of experience, and the traditions of ages. Many of them deserve the veneration which they receive; but a constitution, in the American sense of the word, as accepted in all the States of North and South America, means an instrument in writing, defining the powers of government, and distributing those powers among different bodies of magistrates for their more judicious exercise. The Constitution of the United States not only did this as regards a national government, but it established a federation of many States by the same instrument, in which the usual fatal defects in such unions have been corrected with such felicity, that during the hundred years of its existence the union of the States has grown stronger, and has received within that Union other States exceeding in number those of the original federation.

It is not only the first important written constitution found in history, but it is the first one which contained the principles necessary to the successful confederation of numerous powerful States. I do not forget, nor do I mean to disparage, our sister, the federal republic of Switzerland: but her continuance as an independent power in Europe is so largely due to her compact territory, her inaccessible mountains, her knowledge of the necessity of union to safety, and the policy of her powerful neighbors which demands of each other the recognition of her rights, that she hardly forms an exception. *Miller's Const. pp. 26-27.*

Mr. Bancroft thus speaks of it. "The members were awe-struck at the result of their counsels; the Constitution was a nobler work than any one of them believed possible to devise." And he prefaces the volume of his invaluable history of the formation of the Constitution with a sentiment of Mr. Gladstone, the greatest living statesman of England, who said: "As the British constitution is the most subtle organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." *Miller's Const. pp. 31-32.*

### Compromises of the Constitution.

Mr. Madison in writing to Mr. Van Buren as to his speech on the Foote Resolution, says:

You will not, I am sure, take it amiss, if I here point to an *error of fact* in your "observations on Mr. Foote's amendment." It struck me when first reading them, but escaped my attention when thanking you for the copy with which you favored me. The *threatening contest* in the Convention of 1787 did not, as you supposed, turn on the degree of power to be granted to the Federal Government, but on the rule by which the States should be represented and vote in the Government; the smaller States insisting on the rule of equality in all respects; the larger, on the rule of proportion to inhabitants; and the compromise was that which established an equality in the Senate and an inequality in the House of Representatives.

The contests and compromises turning on the grants of power, though very important in some instances, were knots of a less "Gordian" character. *3 Writings of Madison, p. 634.*

Compromises are the foundation of the Federal Constitution. The members of the Convention were too experienced in public life to sacrifice the public welfare for a syllogism. They cared nothing for a name when the thing they wish could be gained in substance under another term. They were too wise to reject a part when they could not obtain the whole. Their sagacity was excelled only by their patriotism.

After the struggle between those who wish a new national constitution and those who were willing only to accept an amendment of the Articles of Confederation had ended in the defeat of the latter, the word "national" was stricken from the paper. Provided that the form was national, they were satisfied that it might be termed federal, even though that name was susceptible of two inconsistent interpretations. The names of President and Congress were continued, because used under the Confederation, although the House of Representatives, at least, had no resemblance to a congress of ambassadors, and the new executive did not preside. These, however, were in the nature of concessions to popular prejudices, made voluntarily. Between the members of the Convention were constant differences which more than once threatened a disruption, and were only harmonized by reluctant compromise. *Foster on the Constitution, Vol. I, pp. 41-42.*

As a result of their labors they established a federal republic with a presidential form of government. They created a strong and stable nation with local self-government secured to the different States, who

were restrained from creating domestic discord by unjust discrimination in favor of their own citizens. The instrument that they framed has withstood the shock of the invasion of a foreign army, which captured and burned the capital, and of a civil war which divided the whole country for five years into two hostile camps, and left the conquered section so disordered that for ten years more its local governments were upheld by the national sword. During all this time private property has remained secure, and civil liberty undisturbed except for a brief interval amidst the embers of rebellion. Despite the strain caused by the immigration of a vast foreign population of servile races, debased by generations of tyranny, by custom as well as inheritance unfitted to exercise the rights of citizenship, the sovereignty of the people has remained undiscredited and unimpaired, as a beacon light for the friends of popular government throughout the world. In the struggle between the supporters of civilization against the hordes of barbarians within their ranks, which is now in progress throughout Europe as well as America, property has more safety here than in any other country. The spectacle of a people submitting public controversies to the same mode of settlement as private lawsuits and acquiescing in the decisions, has set an example which foreign nations are about to imitate, not only in internal discords, but in those which are international. *Foster on the Constitution, Vol. 1. p. 45.*

### Construction of the Constitution.

Mr. Justice Miller says :

All loose methods of construing authority are dangerous, as well as all such as are too limited to serve the purposes for which they were intended. The Constitution must be looked at in the light of the ends it was designed to accomplish, having in view the evils it was intended to remedy and the benefits it was to exert. We must examine it in the light of the fact that we were a dissolving people, when it was designed anew to bind together in a relation which should continue forever; that the Confederation was rapidly falling to pieces for want of power to protect itself; and that one of the main purposes of this instrument was to give to the Central Government that power. It must not be forgotten that the Confederacy, or the government that existed under the Articles of Confederation, could only request the States to do a great many things necessary in order to maintain and carry on the Federal Government successfully, and that it was desirable to give the new one the power of operating directly upon the people without going through the instrumentality of the States. *Miller's Const. pp. 100, 101.*

Another canon of construction which must not be overlooked has reference to the fundamental nature of the novel government which was erected, very much in the nature of an experiment, by the Colonies when they severed the ties which bound them to England. The Federal Government which they founded is one of conceded or granted powers. The State governments are governments authorized to exercise all the powers not prohibited by the Federal Government or by the Constitution of the United States. There is a corresponding difference

in construction, therefore, and this difference pervades the Federal and State Constitutions throughout the entire catalogue of their powers and the limitations thereon.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Amendment X. *Miller's Const. pp. 102, 103 and note.*

The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. *Loan Association v. Topeka, 20 Wall. 655, 663.*

"The Executive, in our governments, is not the sole, it is scarcely the principal, object of my jealousy. The tyranny of the Legislature is the most formidable dread at present, and will be for many years." Letters of Jefferson to Madison, March 15, 1789; *Jefferson's Works, vol. 3, p. 5. Miller's Const. note on pp. 104-5.*

It is a maxim of our municipal law, and, I believe, of universal law, that he who permits the end, permits of course the means, without which the end can not be effected. *12 Jefferson's Writings, (Mem. ed.), p. 18.*

From the very beginning of the Government there have been two theories for the construction of the Constitution. The thorough-going Federalist on the one hand, insists that it must be construed with reference to the circumstances which made it necessary, and with a just conception of the objects which its framers desired to accomplish by it. Hence he contends that the delegated powers are to be construed liberally, and that implied powers are to be assumed when necessary to fully carry delegated powers into effect. On the other hand, the strict States' rights man plants himself upon the Tenth Amendment, as the people's contemporaneous construction, and contends that the National Government is a government with delegated powers only, and that the Instrument of delegation should be construed strictly. *Miller's Const. p. 117.*

Prior to the adoption of the Constitution, there being no Federal judiciary (with the exception of the Prize Courts), Congress itself set the limit to its own powers by its executive and legislative acts. *Miller's Const. pp. 118, 119.*

The Federalist is undoubtedly the primer and great text-book as for the construction of the Constitution. It was written by Jay, Hamilton and Madison, about the time the Constitution was being ratified by the States, for the purpose of explaining its meaning and provisions to the people.

Mr. Jefferson proposed, that, with the Declaration of Independence, the Valedictory of General Washington, and the Virginia and Kentucky Resolutions and Reports of 1798-99, and the Federalist should be text-books in the University. He describes the last as "being an authority to which appeal is habitually made by all, and rarely declined or denied by any, as evidence of the general opinion of those who framed and



of those who accepted the Constitution of the United States, on questions as to its general meaning." See in vol. ii, p. 382. He speaks of the Federalist as being, in his opinion, the best commentary on the principles of Government that ever was written. In some parts, it is discoverable that the author meant only to say what may be best said in defence of opinions in which he did not concur. But, in general, it establishes firmly the plan of Government. He says: "I confess, it has rectified me on several points. As to the Bill of Rights, however, I think it should still be added." This was materially affected by the amendments to the Constitution.

Mr. Madison in 1819, wrote Judge Roane relative to the construction placed on the Constitution by the Court in the case of *McCulloch v. Md.*, in which he says:

It appears to me, as it does to you, that the occasion did not call for the general and abstract doctrine interwoven with the decision of the particular case. I have always supposed that the meaning of a law, and, for a like reason, of a constitution, so far as it depends on judicial interpretation, was to result from a course of particular decisions, and not those from a previous and abstract comment on the subject. The example in this instance tends to reverse the rule, and to forego the illustration to be derived from a series of cases actually occurring for adjudication.

I could have wished, also, that the judges had delivered their opinions *seriatim*. The case was of such magnitude, in the scope given to it, as to call, if any case could do so, for the views of the subject separately taken by them. This might either, by the harmony of their reasoning, have produced a greater conviction in the public mind; or, by its discordance, have impaired the force of the precedent, now ostensibly supported by a unanimous and perfect concurrence in every argument and dictum in the judgment pronounced.

But what is of most importance is the high sanction given to a latitude in expounding the Constitution, which seems to break down the landmarks intended by a specification of the powers of Congress, and to substitute, for a definite connection between means and ends, a legislative discretion as to the former, to which no practical limit can be assigned. *3 Writings of Madison, p. 143.*

It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a character; more especially those which divide legislation between the general and local governments; and that it might require a regular course of practice to liquidate and settle the meaning of some of them. But it was anticipated, I believe, by few, if any, of the friends of the Constitution, that a rule of construction would be introduced as broad and pliant as what has occurred. And those who recollect, and, still more, those who shared in what passed in the State conventions, through which the people ratified the Constitution, with respect to the extent of the powers vested in Congress, can not easily be persuaded

that the avowal of such a rule would not have prevented its ratification. It has been the misfortune, if not the reproach, of other nations, that their governments have not been freely and deliberately established by themselves. It is the boast of ours that such has been its source, and that it can be altered by the same authority only which established it. It is a further boast, that a regular mode of making proper alterations has been providently inserted in the Constitution itself. It is anxiously to be wished, therefore, that no innovations may take place in other modes, one of which would be a constructive assumption of powers never meant to be granted. If the powers be deficient, the legitimate source of additional ones is always open, and ought to be resorted to. *3 Writings of Madison, p. 145.*

Much of the error in expounding the Constitution has its origin in the use made of the species of sovereignty implied in the nature of government. The specified powers vested in Congress, it is said, are sovereign powers; and that, as such, they carry with them an unlimited discretion as to the means of executing them. It may surely be remarked, that a limited government may be limited in its sovereignty, as well with respect to the means as to the objects of its powers; and that to give an extent to the former superseding the limits to the latter is, in effect, to convert a limited into an unlimited government. There is certainly a reasonable medium between expounding the Constitution with the strictness of a penal law or other ordinary statute, and expounding it with a laxity which may vary its essential character, and encroach on the local sovereignties with which it was meant to be reconcilable.

The very existence of these local sovereignties is a control on the pleas for a constructive amplification of the powers of the General Government. *3 Writings of Madison, p. 146.*

In 1820 Mr. Madison, wrote Judge Roane as follows, as to the recent constructions of the Constitution :

It is to be regretted that the court is so much in the practice of mingling with their judgments pronounced, comments and reasonings of a scope beyond them: and that there is often an apparent disposition to amplify the authorities of the Union at the expense of those of the States. It is of great importance, as well as of indispensable obligation, that the constitutional boundary between them should be impartially maintained. Every deviation from it in practice detracts from the superiority of a chartered over a traditional Government, and mars the experiment which is to determine the interesting problem, whether the organization of the political system of the United States establishes a just equilibrium or tends to a preponderance of the national or the local powers, and, in the latter case, whether of the national or of the local.

A candid review of the vicissitudes which have marked the progress of the General Government does not preclude doubts as to the ultimate and fixed character of a political establishment, distinguished by so novel and complex a mechanism. On some occasions, the advantage taken of favorable circumstances gave an impetus and direction to it, which seemed to threaten subversive encroachments on the rights and authorities of the States. At a certain period we witnessed a spirit of usurpation by some of these on the necessary and legitimate functions

of the former. At the present date, theoretic innovations, at least, are putting new weights into the scale of Federal sovereignty, which make it highly proper to bring them to the bar of the Constitution. *3 Writings of Madison*, pp. 217-218.

Such is the plastic faculty of legislation, that, notwithstanding the firm tenure which judges have on their offices, they can, by various regulations, be kept or reduced within the paths of duty; more especially with the aid of their amenability to the legislative tribunal in the form of impeachment. It is not probable that the Supreme Court would long be indulged in a career of usurpation opposed to the decided opinions and policy of the legislature.

Nor do I think that Congress, even seconded by the Judicial power, can, without some change in the character of the nation, succeed in  *durable* violations of the rights and authorities of the States. The responsibility of one branch to the people, and of the other branch to the legislatures of the States, seem to be, in the present stage, at least, of our political history, an adequate barrier. In the case of the alien and sedition laws, which violated the general *sense* as well as the *rights* of the States, the usurping experiment was crushed at once, notwithstanding the co-operation of the Federal judges with the Federal laws.

But what is to control Congress when backed, and even pushed on, by a majority of their constituents, as was the case in the late contest relative to Missouri, and as may again happen in the constructive power relating to roads and canals? Nothing within the pale of the Constitution, but sound arguments and conciliatory expostulations addressed both to Congress and to their constituents. *3 Writings of Madison*, p. 219.

In expounding the Constitution, the court seems not sensible that the intention of the parties to it ought to be kept in view, and that, as far as the language of the instrument will permit, this intention ought to be traced in the contemporaneous expositions. But is the court as prompt and as careful in citing and following this evidence when against the Federal authority as when against that of the States? (See the partial reference of the court to the "Federalist.") *3 Writings of Madison*, p. 220.

On the question relating to involuntary submissions of the States to the tribunal of the Supreme Court, the court seems not to have adverted at all to the expository language when the Constitution was adopted, nor to that of the eleventh amendment, which may as well import that it was declaratory as that it was restrictive of the meaning of the original text. It seems to be a strange reasoning, also, that would imply that a State, in controversies with its own citizens, might have less of sovereignty than in controversies with foreign individuals, by which the national relations might be affected. Nor is it less to be wondered at that it should have appeared to the court that the dignity of a State was not more compromised by being made a party against a private person than against a co-ordinate party.

The Judicial power of the United States over cases arising under the Constitution must be admitted to be a vital part of the system. But that there are limitations and exceptions to its efficient character, is among the admissions of the court itself. The eleventh amendment introduced exceptions, if there were none before. A liberal and steady

course of practice can alone reconcile the several provisions of the Constitution literally at variance with each other, of which there is an example in the treaty power and the legislative power on subjects, to which both are extended by the words of the Constitution. It is particularly incumbent, in taking cognizance of cases arising under the Constitution, and in which the laws and rights of the States may be involved, to let the proceedings touch individuals only. Prudence enjoins this, if there were no other motive, in consideration of the impracticability of applying coercion to States. *3 Writings of Madison, pp. 221-222.*

The Gordian knot of the Constitution seems to lie in the problem of collision between the Federal and State powers, especially as eventually exercised by their respective tribunals. If the knot can not be untied by the text of the Constitution, it ought not, certainly, to be cut by any political Alexander.

I have always thought that a construction of the instrument ought to be favored as far as the text would warrant, which would obviate the dilemma of a judicial recounter or a mutual paralysis; and that on the abstract question, whether the Federal or the State decisions ought to prevail, the sounder policy would yield to the claims of the former.

Our governmental system is established by a compact, not between the Government of the United States and the State governments, but between the States as sovereign communities, stipulating each with the other a surrender of certain portions of their respective authorities to be exercised by a common government, and a reservation, for their own exercise, of all their other authorities. *3 Writings of Madison, pp. 222-223.*

Mr. Madison in writing to a friend relative to his private judgment as to the proceedings in the Constitutional Convention, as a key to the Construction of the Constitution among other things says:

As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character. However desirable it be that they should be preserved as a gratification to the laudable curiosity felt by every people to trace the origin and progress of their political institutions, and as a source, perhaps, of some lights on the science of Government, the legitimate meaning of the Instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must be, not in the opinions or intentions of the body which planned and proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions, where it received all the authority which it possesses. *3 Writings of Madison, p. 228.*

The argument for the consequences which may attend upon the interpretation of a constitutional provision is not always the best argument, but is one which may sometimes be considered. As was said by this court in *Maxwell v. Dow*, 176 U. S. 590: "The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an



instrument. But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the State and Federal government to each other and of both these governments to the people, the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them." *182 U. S. Rep. pp. 87-88.*

### **Acquiescence in Construction of the Constitution.**

A construction of the Constitutional practiced upon or acknowledged for a period of nearly forty years, has received a national sanction not to be reversed but by an evidence at least equivalent to the national will. If every new Congress were to disregard a meaning of the instrument uniformly sustained by their predecessors for such a period, there would be less stability in that fundamental law than is required for the public good in the ordinary exposition of law. And the case of the Chancellor's foot, as a substitute for an established measure, would illustrate the greater as well as the lesser evil of uncertainty and mutability.

In expounding the Constitution, it is as essential as it is obvious that the distinction should be kept in view between the usurpation and the abuse of a power. That a tariff for the encouragement of manufactures may be abused by its excess, by its partiality, or by a noxious selection of its objects, is certain. But so may the exercise of every constitutional power; more especially that of imposing indirect taxes, though limited to the object of revenue. *3 Writings of Madison, p. 573.*

It is known that Mr. Madison once denied the power of Congress to establish a national bank, but he yielded his opinion to a different construction placed on the Constitution, by the States, the people and the Nation. He thus writes to General LaFayette on the subject:

As I have been charged with inconsistency, in not putting a veto on the last act of Congress establishing a Bank, a power to do which was denied in the Report, a word of explanation may not be improper. My construction of the Constitution on this point is not changed; but I regarded the reiterated sanctions given to the power by the exercise of it through a long period of time, in every variety of form, and in some form or other under every administration preceding mine, with the general concurrence of the State authorities, and acquiescence of the people at large, and without glimpse of change in the public opinion, but evidently with a growing confirmation of it; all this I regarded as a construction put on the Constitution by the nation, which, having made it, had the supreme right to declare its meaning; and regarding, moreover, the establishment of a Bank, under the existing circum-

stances, as the only expedient for substituting a sound currency in place of the vitiated one then working so much mischief, I did not feel myself, as a public man, at liberty to sacrifice all these public considerations to my private opinion. *3 Writings of Madison, p. 542.*

### **Congressional Construction of the Constitution.**

In 1825, about a year before the death of Mr. Jefferson, Mr. Madison wrote him as follows, as to the Constructions being placed on the Constitution by Congress, as for utility:

It seems strange, but it is a certain fact, that there are several instances of distinguished politicians who reject the general heresies of Federalism, most decidedly the amalgamating magic of the terms "General welfare," who yet admit the authority of Congress as to roads and canals, which they squeeze out of the enumerated articles. In truth, the great temptation of "utility," brought home to local feelings, is the most dangerous snare for Constitutional orthodoxy; and I am not sure that the Judiciary branch of the Government is not a safer expositor of the power of Congress than Congress will be when backed, and even pushed on, by their constituents, as in the canal and the Missouri cases. Were the unauthorized schemes of internal improvement as disagreeable to (a) majority of the people and of the States as they are deemed advantageous, who can doubt the different reasonings and result that would be observed within the walls of Congress? The will of the nation being omnipotent for right, is so far wrong also; and the will of the nation being in the majority, the minority must submit to that danger of oppression as an evil infinitely less than the danger to the whole nation from a will independent of it. I consider the question as to canals, &c., as decided, therefore, because sanctioned by the nation under the permanent influence of benefit to the major part of it; and if not carried into practice, will owe its failure to other than Constitutional obstacles. *3 Writings of Madison, p. 483.*

### **Keys to Construction of the Constitution.**

I am not sure that I understand your allusions to the origin of the Convention of 1787. If I do, you have overlooked steps antecedent to the interposition of the old Congress. That Convention grew out of the Convention at Annapolis, in August 1786, recommended by Virginia in the preceding winter. It had for its objects certain provisions only, relating to commerce and revenue. The Deputies who met, inferring from an interchange of information as to the state of the public mind that it had made a great advance, subsequent even to the act of Virginia, towards maturity for a thorough reform of the Federal system, took the decisive step of recommending a convention, with adequate powers for the purpose. The Legislature of Virginia, being the first that assembled, set the example of compliance, and endeavored to strengthen it by putting General Washington at the head of the Deputation.

I can not but highly approve the industry with which you have searched for a key to the sense of the Constitution, where alone the true one can be found, in the proceedings of the Convention, the contemporary expositions, and, above all, in the ratifying conventions of

the States. If the instrument be interpreted by criticisms which lose sight of the intention of the parties to it, in the fascinating pursuit of objects of public advantage or convenience, the purest motives can be no security against innovations materially changing the features of the government. *3 Writings of Madison, pp. 521-522.*

### Legislative Construction of the Constitution.

Mr. Madison thus speaks of the subject:

A Constitution being derived from a superior authority, is to be expounded and obeyed, not controlled or varied, by the subordinate authority of a Legislature. A law, on the other hand, resting on no higher authority than that possessed by every successive Legislature, its expediency as well as its meaning is within the scope of the latter.

The case in question has its true analogy in the obligation arising from judicial expositions of the law on succeeding judges; the Constitution being a law to the legislator, as the law is a rule of decision to the judge.

And why are judicial precedents, when formed on due discussion and consideration, and deliberately sanctioned by reviews and repetitions, regarded as of binding influence, or, rather, of authoritative force in settling the meaning of a law? It must be answered, 1st. Because it is a reasonable and established axiom, that the good of society requires that the rules of conduct of its members should be certain and known, which would not be the case if any judge, disregarding the decision of his predecessors, should vary the rule of law according to his individual interpretation of it. *Misera est servitus ubi jus est aut vagum aut incognitum.* 2. Because an exposition of the law publicly made, and repeatedly confirmed by the constituted authority, carried with it, by fair inference, the sanction of those who, having made the law through their legislative organs, appear, under such circumstances, to have determined its meaning through their judiciary organ.

Can it be of less consequence that the meaning of a Constitution should be fixed and known, that the meaning of a law should be so? Can, indeed, a law be fixed in its meaning and operation unless the Constitution be so? On the contrary, if a particular Legislature, differing in the construction of the Constitution from a series of preceding constructions, proceed to act on that difference, they not only introduce uncertainty and instability in the Constitution, but in the laws themselves; inasmuch as all laws preceding the new construction and inconsistent with it are not only annulled for the future, but virtually pronounced nullities from the beginning. *4 Writings of Madison, pp. 184-5.*

It was in conformity with the view here taken, of the respect due to deliberate and reiterate precedents, that the Bank of the United States, though on the original question held to be unconstitutional, received the Executive signature in the year 1817. The act originally establishing a bank had undergone ample discussion in its passage through the several branches of the Government. It had been carried into execution throughout a period of twenty years with annual legislative recognitions; in one instance, indeed, with a positive ramification of it into a new state; and with the entire acquiescence of all the local authori-

ties, as well as of the nation at large; to all of which may be added, a decreasing prospect of any change in the public opinion adverse to the constitutionality of such an institution. A veto from the Executive, under these circumstances, with an admission of the expediency and almost necessity of the measure, would have been a defiance of all the obligations derived from a course of precedents amounting to the requisite evidence of the national judgment and intention. *4 Writings of Madison, p. 186.*

### **Intent To Be Sought in Construction of the Constitution.**

A constitution is not to be interpreted on narrow or technical principles, but liberally and on broad general lines, in order that it may accomplish the objects of its establishment and carry out the general principles of government. *Black on Constitutional Law, 67.*

It is a cardinal rule in the interpretation of constitutions that the instrument must be so construed as to give effect to the intention of the people, who adopted it.

This intention is to be sought in the constitution itself, and the apparent meaning of the words employed is to be taken as expressing it, except in cases where that assumption would lead to absurdity, ambiguity, or contradiction. *Black on Constitutional Law, 68.*

### **Who Construes the Constitution?**

Mr. Bryce, the great English statesman and constitutional law writer, thus answers the question:

It is an error to suppose that the judiciary is the only interpreter of the Constitution, for a large field is left open to the other authorities of the government, whose views need not coincide, so that a dispute between those authorities, although turning on the meaning of the Constitution, may be incapable of being settled by any legal proceeding. This causes no great confusion, because the decision, whether of the political or the judicial authority, is conclusive so far as regards the particular controversy or matter passed upon.

The above is the doctrine now generally accepted in America. But at one time the Presidents claimed the much wider right of being, except in questions of pure private right, generally and *prima facie* entitled to interpret the Constitution for themselves, and to act on their own interpretation, even when it ran counter to that delivered by the Supreme Court. Thus Jefferson denounced the doctrine laid down in the famous judgment of Chief Justice Marshall in the case of *Marbury v. Madison*, thus Jackson insisted that the Supreme Court was mistaken in holding that Congress had power to charter the United States bank, and that he, knowing better than the court did what the Constitution meant to permit, was entitled to attack the bank as an illegal institution, and to veto a bill proposing to re-charter it. Majorities in Congress have more than once claimed for themselves the same independence. But of late years both the executive and the legislature have practically receded from the position which the language formerly used seemed to assert. *Bryce's American Commonwealth, Vol. I, 365-6.*

Every power alleged to be vested in the National government, or any organ thereof, must be affirmatively shown to have been granted.



There is no presumption in favor of the existence of a power; on the contrary, the burden of proof lies on those who assert its existence, to point out something in the Constitution which, either expressly or by necessary implication, confers it. Just as an agent, claiming to act on behalf of his principal, must make out by positive evidence that his principal gave him the authority he relies on. *Bryce's American Commonwealth, Vol. I, 368.*

When once the grant of a power by the people to the National government has been established, that power will be construed broadly. The strictness applied in determining its existence gives place to liberality in supporting its application. The people—so Marshall and his successors have argued—when they confer a power, must be deemed to confer a wide discretion as to the means whereby it is to be used in their service. *Bryce's American Commonwealth, Vol. I, 369.*

This doctrine of implied powers, and the interpretation of the words "necessary and proper," were for many years a theme of bitter and incessant controversy among American lawyers and publicists. The history of the United States is in a large measure a history of the arguments which sought to enlarge or restrict its import. One school of statesmen urged that a lax construction would practically leave the States at the mercy of the National government, and remove those checks on the latter which the Constitution was designed to create; while the very fact that some powers were specifically granted must be taken to import that those not specified were either held, according to the old maxim *expressio unius exclusio alterius*, which Lord Bacon concisely explains by saying, "as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated." It was replied by the opposite school that to limit the powers of the government to those expressly set forth in the Constitution would render that instrument unfit to serve the purposes of a growing and changing nation, and would, by leaving men no legal means of attaining necessary but originally un contemplated aims, provoke revolution and work the destruction of the Constitution itself. *Bryce's American Commonwealth, Vol. I, 370-1.*

In 1803, President Jefferson negotiated and completed the purchase of Louisiana, the whole vast possession of France beyond the Mississippi. He believed himself to be exceeding any powers which the Constitution conferred; and desired to have an amendment to it passed, in order to validate his act. But Congress and the people did not share his scruples, and the approval of the legislature was deemed sufficient ratification for a step of transcendent importance, which no provision of the Constitution bore upon. In 1807 and 1808 Congress laid, by two statutes, an embargo on all shipping in United States ports, thereby practically destroying the lucrative carrying trade of the New England States. Some of these States declared the Act unconstitutional, arguing that a power to regulate commerce was not power to annihilate it, and their courts held it to be void. Congress, however, persisted for a year, and the Act, on which the Supreme Court never formally pronounced, has been generally deemed within the Constitution, though Justice Story (who had warmly opposed it when he sat in Congress) remarks that it went to the extreme verge. More startling, and more far-reaching in their consequences, were the assumptions of Federal au-

thority made during the Civil War by the executive and confirmed, some expressly, some tacitly, by Congress and the people. It was only a few of these that came before the courts, in some instances, disapproved them. But the executive continued to exert this extraordinary authority. Appeals made to the letter of the Constitution by the minority were discredited by the fact that they were made by persons sympathizing with the Secessionists who were seeking to destroy it. So many extreme things were done under the pressure of necessity that something less than these extreme things came to be accepted as a reasonable and moderate compromise. *Bryce's American Commonwealth, Vol. I, 372-3.*

### **Broad and Strict Constructions of the Constitution.**

There has always been a party professing itself disposed to favor the central government, and therefore a party of broad construction. There has always been a party claiming that it aimed at protecting the rights of the States, and therefore a party of strict construction. Some writers have gone so far as to deem these different views of interpretation to be the foundation of all the political parties that have divided America. This view, however, inverts the facts. It is not because men have differed in their reading of the Constitution that they have advocated or opposed an extension of Federal powers; it is their attitude on this substantial issue that has determined their attitude on the verbal one. Moreover, the two great parties have several times changed sides on the very question of interpretation. The purchase of Louisiana and the Embargo Acts were the work of the Strict Constructionists, while it was the Loose Constructionist party which protested against the latter measure, and which, at the Hartford Convention of 1814, advanced doctrines of State rights almost amounting to those subsequently asserted by South Carolina in 1832 and by the Secessionists of 1861. Parties in America, as in most countries, have followed their temporary interest; and if that interest happened to differ from some traditional party doctrine, they have explained the latter away. Whenever there has been a serious party conflict, it has been in reality a conflict over some living and practical issue, and only in form a debate upon canons of legal interpretation. What is remarkable, though natural enough in a country governed by a written instrument, is that every controversy has got involved with questions of constitutional construction. *Bryce's American Commonwealth, Vol. I, 378-9.*

Since the Civil War there has been much less of this casuistry because there have been fewer occasions for it, the broad constructive view of the Constitution having practically prevailed—prevailed so far that the Supreme Court now holds that power of Congress to make paper money legal tender is incident to the sovereignty of the National government, and that a Democratic House of Representatives passes a bill giving a Federal commission vast powers over all the railways which pass through more than one State. There is still a party inclined to strict construction, but the strictness which it upholds would have been deemed lax by the broad constructionists of thirty years ago. The interpretation which has thus stretched the dangerous resource. But it must be remembered that even the constitutions we call rigid

must make their choice between being bent or being broken. The Americans have more than once bent their Constitution in order that they might not be forced to break it. *Bryce's American Commonwealth*, Vol. I, 380.

### Strict Constructions.

The Supreme Court thus speaks on the subject :

What do men mean by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument, for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we can not perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred. *9 Wheat., 188-189.*

Powerful and ingenious minds, taking as postulates that the powers expressly granted to the government of the Union, are to be contracted by construction into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, nay, by a course of well-digested but refined and metaphysical reasoning founded on the premises, explain away the constitution of our country, and leave it a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined. *9 Wheat., 222.*

### Progressive Constructions.

The Supreme Court<sup>1</sup> said in a recent case :

There is no force in the argument that we have entered a new era requiring new and progressive adjudications, and that unless this court

<sup>1</sup>The Supreme Court, of course, stands by the Constitution; it has nothing to do with public policy, politics, war, or necessity. It has no wish

or will, but judgment only. It represents the minority, not the majority. It is the great balance-wheel of the government.

admits the power of the State to tax to be as claimed, it will enable aggregations of capital to escape just taxation, by the several States. This assertion, at best, but suggests that unless constitutional safeguards be overthrown, harm will come and wrong will be done. In its last analysis, the claim is but a protestation that our institutions are a failure, that time has proven that this court should now recognize that fact and shape its adjudications accordingly. The claim is as unsound as the fictitious assertions of expediency by which it is sought to be supported. If it be true that by the present enforcement of the Constitution and laws property will escape taxation, the remedy must come not from violating the constitution but from upholding it. 165 *U. S.*, 254.

### **The Immutability of the Constitution.**

The immutability of the Constitution, and that it should not yield to circumstances, nor be ignored in time of war, under the plea of necessity is best expressed in *Ex parte Milligan*, 4 Wall. 120, where it is said:

"The Constitution itself never yields to treaty or enactment; it neither changes with time, nor does it in theory bend to the force of circumstances. It may be amended according to its own permission; but while it stands, it is 'a law for rulers and people, equally in war and in peace,' and covers with the shield of its protection all classes of men, at all times and under all circumstances.' Its principles can not, therefore, be set aside in order to meet the supposed necessities of great crises. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy and despotism, but the theory of necessity on which it is based is false; for the government within the Constitution has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority." 1 *Tucker's Const.*, p. 364.

### **Text-Books on Construction of the Constitution.**

Mr. Madison thus writes Mr. Jefferson as to substituting text-books for the Virginia Law School:

Sidney and Locke are admirably calculated to impress on young minds the right of nations to establish their own Governments, and to inspire a love of free ones, but afford no aid in guarding our Republican charters against constructive violations. The Declaration of Independence, though rich in fundamental principles, and saying everything that could be said in the same number of words, falls nearly under a like observation. The "Federalist" may fairly enough be re-

<sup>1</sup>The above is true in theory only. In practice, the Constitution is one thing in war and another in peace. Adams, J. Q., said we seem to have two Constitutions, a war Constitution and a peace Constitution. The truth is that in war, we Anglize our Constitution, that is, Congress and the Presi-

dent act as if we had no Constitution. They act under the rule of necessity, which knows no law. Congress dare not oppose the President; he becomes, during war, the law-maker, construer, and executioner. He must win the war, Constitution or no Constitution.



garded as the most authentic exposition of the text of the Federal Constitution, as understood by the body which prepared and the authority which accepted it. Yet it did not foresee all the misconstructions which have occurred, nor prevent some that it did foresee. And what equally deserves remark, neither of the great rival parties have acquiesced in all its comments. It may, nevertheless, be admissible as a school book, if any will be that goes so much in detail. It has been actually admitted into two Universities, if not more—those of Harvard and Rhode Island; but probably at the choice of the Professors, without any injunction from the superior authority. With respect to the Virginia Document of 1799, there may be more room for hesitation. Though corresponding with the predominant sense of the nation, being of local origin, and having reference to a state of parties not yet extinct, an absolute prescription of it might excite prejudices against the University as under party banners, and induce the more bigoted to withhold from it their sons, even when destined for other than the studies of the Law School. *3 Writings of Madison, p. 481.*

I have for your consideration, sketched a modification of the operative passage in your draught, with a view to relax the absoluteness of its injunction, and added to your list of documents the Inaugural Speech and the Farewell Address of President Washington. They may help down what might be less readily swallowed, and contain nothing which is not good; unless it be the laudatory reference in the address to the Treaty of 1795 with G. Britain, which ought not to weigh against the sound sentiments characterizing it. *3 Writings of Madison, p. 482.*

### Ratification of the Constitution.

The following is the language in part of the Virginia Convention which ratified the Constitution and in part the explanation of its meaning by the men who wrote the ratification clause, who did most in making the Constitution and who drafted the first amendments thereto, and who unquestionably knew more of the Constitution and its history than any men who ever lived.

“We, the delegates of the people of Virginia, duly elected in pursuance of a recommendation from the General Assembly, and now met in Convention, having fully and freely investigated and discussed the proceedings of the Federal Constitution, and having prepared, as well as the most mature deliberation hath enabled us, to decide thereon—DO, in the name and in behalf of the people of Virginia, declare and make known, that the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them whenever the same shall be perverted to the injury or oppression; and that every power not granted thereby remains with them, and at their will. That, therefore, no right of any denomination can be cancelled, abridged, restrained, or modified, by the Congress, by the Senate or House of Representatives, acting in any capacity, by the President, or any department or officer of the United States, except in those instances in which power is given by the Constitution for those purposes; and that, among

other essential rights, the liberty of conscience and of the press can not be cancelled, abridged, restrained, or modified, by any authority of the United States."

The father of the Constitution thus speaks on the subject:

Here is an express and solemn declaration by the Convention of the State, that they ratified the Constitution in the sense that no right of any denomination can be cancelled, abridged, restrained, or modified, by the Government of the United States, or any part of it, except in those instances in which power is given by the Constitution; and in the sense, particularly, "that among other essential rights, the liberty of conscience and freedom of the press can not be cancelled, abridged, restrained, or modified, by any authority of the United States."

Words could not well express in a fuller or more forcible manner the understanding of the Convention, that the liberty of conscience and the freedom of the press were *equally* and *completely* exempted from all authority whatever of the United States.

Under an anxiety to guard more effectually these rights against every possible danger, the Convention, after ratifying the Constitution, proceeded to prefix to certain amendments proposed by them a declaration of rights, in which are two articles providing, the one for the liberty of conscience, the other for the freedom of speech and of the press. *Writings of James Madison, Vol. IV, 551.*

Mr. Davis thus states a part of the history of ratification:

Massachusetts and New Hampshire, in their ordinances of ratification, expressing the opinion "that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of this Commonwealth (State (New Hampshire) ), and more effectually guard against an undue administration of the Federal Government," each recommended several such amendments, putting this at the head in the following form:

"That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution are reserved to the several States, to be by them exercised."

Of course, those staunch Republican communities meant *the people of the States*—not their *governments*, as something distinct from their people.

New York expressed herself as follows:

"That the powers of government may be reassumed by the people whenever it shall become necessary to their happiness; that every power, jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the people of the several States, or to their respective State governments, to whom they may be granted the same; and that those clauses in the said Constitution, which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed either as exceptions to certain specified powers or as inserted merely for greater caution."

South Carolina expressed the idea thus:

"This Convention doth also declare that no section or paragraph of the said Constitution warrants a construction that *the States do not retain* every power not expressly relinquished by them and vested in the General Government of the Union."

North Carolina proposed it in these terms:

"Each State in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States or to the departments of the General Government." *Davis on The Rise and Fall of The Confederate Government, Vol. I, 146-7.*

On a motion for New York to conditionally ratify the Constitution, Hamilton said:

"My opinion is, that a reservation of a right to withdraw, if amendments be not decided on under the form of the Constitution within a certain time, is a *conditional* ratification; that it does not make New York a member of the new union, and, consequently, that she could not be received on that plan. The Constitution requires an adoption *in toto* and *forever*. It has been so adopted by the other states. An adoption for a limited time would be as defective as an adoption of some of the articles only. In short, any *condition* whatever must vitiate the ratification. The idea of reserving a right to withdraw was started at Richmond, and considered as a conditional ratification, which was itself abandoned as worse than a rejection." *Bancroft on the History of the Constitution of the United States, 459.*

Mr. Foster thus states part of the history of ratification:

Much stress is laid, by the advocates of secession, upon the declarations in the ratifications of Virginia and New York. The ratification of New York is preceded by a declaration of twenty-four articles concerning political rights and the construction of the Constitution. These are followed by the declaration:

"Under these impressions, and declaring that the rights aforesaid can not be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration, we, the said delegates, in the name and on behalf of the people of the State of New York, do by these presents assent to and ratify the said Constitution."

Manifestly, this declaration of the understanding in New York, to which the other States did not accede, could have no binding effect upon the construction of the instrument. It was not intended to be either a reservation or a condition.

But there is nothing in those declarations which tends to support the right of secession. The only one upon which stress is laid is the third, which states:

"That the powers of the government may be reassumed by the people whensoever it shall become necessary to their happiness."

This merely refers to the right of revolution which is recognized in the Declaration of Independence, and does not claim to be a reservation of any legal right of receding from the instrument thus ratified. Similar observations apply to the ratification of Virginia, which is preceded by the declaration:

"That the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them whenever the same shall be perverted to their injury or oppression, and that every power not granted thereby remains with them, and at their will." *Foster on the Constitution, Vol. 1, p. 72.*

In the New York Convention, Lansing moved a resolution which reserved the right to withdraw from the Union. Hamilton wrote for advice to Madison, who was in Congress at New York. The answer of Madison was read to the Convention by Hamilton as follows:

"My opinion is, that a reservation of a right to withdraw, if amendments be not decided on under the form of the Constitution within a certain time, is conditional ratification; that it does not make New York a member of the new Union, and, consequently, that she could not be received on that plan. The Constitution requires an adoption *in toto* and *forever*. It has been so adopted by the other States. An adoption for a limited time would be as defective as an adoption of some of the articles only. In short, any condition whatever must vitiate the ratification. The idea of reserving a right to withdraw was started at Richmond, and considered as a conditional ratification, which was itself abandoned as worse than a rejection." *Foster on the Constitution, Vol. 1, p. 73.*

NOTE.—Hamilton and Jefferson were Washington's Constitutional advisers; yet Madison was the adviser of both Hamilton and Jefferson; both proclaimed him to be the wisest man as to constitutional government in the whole world.

Webster answered Haynes as follows:

"If the whole of the gentleman's main proposition were conceded to him—that is to say, if I admit, for the sake of the argument, that the Constitution is a compact between States—the inferences which he draws from that proposition are warranted by no just reason; because, if the Constitution be a compact between States, still that Constitution, or that compact, has established a government with certain powers; and whether it be one of those powers, that it shall construe and interpret for itself the terms of the compact, in doubtful cases, can only be decided by looking to the compact, and inquiring what provisions it contains on this point. Without any inconsistency with natural reason, the government, even thus created, might be trusted with this power of construction. The extent of its power, therefore, must still be sought for in the instrument itself." *Foster on the Constitution, Vol. 1, p. 78.*

Mr. Gouverneur Morris explained the distinction between a *federal* and a *national government*; the former being a mere compact resting on the good faith of the parties, the latter having a complete and *compulsive* operation. He contended that in all communities there must be one supreme power, and one only.

Mr. Mason observed, not only that the present Confederation was deficient in not providing for coercion and punishment against delinquent states, but argued very cogently, that punishment could not, in the nature of things, be executed on the State collectively, and therefore that such a government was necessary as could directly operate on individuals, and would punish those only whose guilt required it. *Foster on the Constitution, Vol. 1, p. 85.*



Mr. Davis thus states the views of some of the makers :

Mr. Gerry, a distinguished member from Massachusetts—afterward Vice-President of the United States—said, "If nine out of thirteen (States) can dissolve the compact, six out of nine will be just as able to dissolve the future one hereafter."

Mr. Madison, who was one of the leading members of the Convention, advocating afterward, in the "Federalist," the adoption of the new Constitution, asks the question, "On what principle the Confederation, which stands in the solemn form of a compact among the States, can be superseded without the unanimous consent of the parties to it?" He answers this question "by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed." *Davis on The Rise and Fall of The Confederate Government, Vol. I, 100.*

The article declares that "the ratification of the Convention of nine States shall be sufficient for the establishment of this Constitution"—not between all, but—"between the States so ratifying the same." It is submitted whether a fuller justification of this right of the nine States to form a new Government is not found in the fact of the sovereignty in each of them, making them "a law unto themselves," and therefore the final judge of what the necessities of each community demand. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 101.*

It was not even established by the *States in the aggregate*, nor was it proposed that it should be. It was submitted for the acceptance of each separately, the time and place at their own option, so that the dates of ratification did extend from December 7, 1787, to May 29, 1790. The long period required for these ratifications makes manifest the absurdity of the assertion, that it was a decision by the votes of one people, or one community, in which a majority of the votes cast determined the result.

We have seen that the delegates to the Convention of 1787 were chosen by the several States, *as States*—it is hardly necessary to add that they voted in the Convention, as in the Federal Congress, by States,—each State casting one vote. We have seen, also, that they were sent for the "sole and express purpose" of revising the Articles of Confederation and devising means for rendering the Federal Constitution "adequate to the exigencies of government and the preservation of the Union." *Davis on The Rise and Fall of The Confederate Government, Vol. I, 102.*

Mr. Madison, who was one of the most distinguished of its authors and signers, writing after it was completed and signed, but before it was ratified, said: "It is time now to recollect that the powers (of the Convention) were merely advisory and recommendatory; that they were so meant by the States, and so understood by the Convention; and that the latter have accordingly planned and proposed a Constitution, which is to be of no more consequence than the paper on which it is written,

unless it be stamped with the approbation of those to whom it is addressed."—("Federalist," No. XL). *Davis on The Rise and Fall of The Confederate Government, Vol. I. 103.*

The acceptance of these eleven States having been signified to the Congress, provision was made for putting the new Constitution in operation. This was effected on March 4, 1789, when the Government was organized, with George Washington as President, and John Adams, Vice-President; the Senators and Representatives elected by the States which had acceded to the Constitution, organizing themselves as a Congress.

Meantime, two States were standing, as we have seen, unquestioned and unmolested, in an attitude of absolute independence. The Convention of North Carolina, of August 2, 1788, had rejected the proposed Constitution. *Davis on The Rise and Fall of The Confederate Government, Vol. I. 110.*

More than a year afterward, when the newly organized Government had been in operation for nearly nine months, and when—although no convention of the States had been called to revise the Constitution—North Carolina had good reason to feel assured that the most important provisions of her proposed amendments and "declaration of rights" would be adopted, she acceded to the amended compact. On November 21, 1789, her Convention agreed, "in behalf of the freemen, citizens, and inhabitants of *the State of North Carolina,*" to "adopt and ratify" the Constitution.

In Rhode Island the proposed Constitution was at first submitted to a direct vote of the people, who rejected it by an overwhelming majority. Subsequently,—that is, on May 29, 1790, when the reorganized Government had been in operation for nearly fifteen months, and when it had become reasonably certain that the amendments thought necessary would be adopted—a convention of the people of Rhode Island acceded to the new Union, and ratified the Constitution, though even then by a majority of only two votes in sixty-six—34 to 32. The ratification was expressed in substantially the same language as that which has now been so repeatedly cited:

"We, the delegates of the people of the State of Rhode Island and Providence Plantations, duly elected and met in convention, \* \* \* in the name and behalf of *the people of Rhode Island and Providence Plantations,* so, by these presents, assent to and ratify the said Constitution." *Davis on The Rise and Fall of The Confederate Government, Vol. I, 111.*

If a ratification had been required of all the States instead of nine as a condition precedent to give it life and motion, it is now known that it would never have been ratified. North Carolina in her first convention rejected it; and Rhode Island did not accede to it until more than a year after it had been in operation. Some delicate questions, under a different state of things, might have arisen. *Story on the Constitution, Vol. V, p. 618, § 1851.*

### **Objections to Ratification of the Constitution.**

It is well known that great opposition was made to the adoption of the Constitution. It was acknowledged on all sides, at the time, that

the old Confederation, from its weakness, had failed, and that something must be done to save the country from anarchy and convulsion; yet, so high was the spirit of liberty—so jealous were our ancestors of that day of power, that the utmost efforts were necessary, under all the then existing pressure, to obtain the assent of the States to the ratification of the Constitution. Among the many objections to its adoption, none were more successfully urged than the absence, in the instrument, of those general provisions which experience had shown to be necessary to guard the outworks of liberty: such as the freedom of the press and of speech,—the rights of conscience,—of trial by jury, and others of like character. It was the belief of those jealous and watchful guardians of liberty, who viewed the adoption of the Constitution with so much apprehension, that all these sacred barriers, without some positive provision to protect them, would, by the power of construction, be undermined and prostrated. So strong was this apprehension, that it was impossible to obtain a ratification of the instrument in many of the States without accompanying it with the recommendation to incorporate in the Constitution various articles, and amendments, intended to remove this defect, and guard against the danger apprehended, by placing these important rights beyond the possible encroachment of Congress. *5 Calhoun's Works, pp. 192-3.*

When the Constitution was first framed, it was received by a great many thinking people with much distrust. An examination of the history of the proceedings of the conventions of the States, which were called to ratify and confirm that instrument, and without which it would have had no efficacy, will show that it was fiercely assailed, and that in the debates in regard to its adoption in several of the States the issue was for a long time doubtful. *Miller's Const., p. 90.*

Washington wrote to Patrick Henry, September 24, 1787: "I wish the Constitution which is offered had been more perfect; but it is the best that could be obtained at this time, and a door is opened for amendments hereafter. The political concerns of this country are suspended by a thread. The convention has been looked up to by the reflecting part of the community with a solicitude which is hardly to be conceived; and if nothing had been agreed on by that body, anarchy would soon have ensued, the seeds being deeply sown in every soil." *Bancroft's History of the Constitution, Vol. 2, p. 231; Miller's Const., Note, p. 90.*

At the first Congress after the organization of the Government, the House proposed seventeen amendments to the Constitution. These were by the Senate reduced to twelve, and they were then submitted to the States. *Miller's Const., Note, p. 92.*

"It is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recom-

mended. These amendments demanded security against the apprehended encroachments of the General Government—not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States. These amendments contain no expression indicating an intention to apply them to the State governments. This court can not so apply them.” *Chief Justice Marshall in Barron v. Mayor and Council of Baltimore*, 7 Pet. 243, 250; *Miller's Const.*, note, p. 93.

It was said to be inconsistent with the genius of the Government which they were establishing, that any one man should exercise the extraordinary authority which that instrument vested in the President of the United States; that the appointment of all the officers of the Federal Government, the distribution of all its patronage, and the control of its army and navy, would, in process of time, enable some man to build up a power that could not be resisted. It was argued that some one would arise who, by that power and with that inclination, would destroy the really democratic features of our government, and finally establish a monarchy in its place. *Miller's Const.*, p. 94.

The branch of the Government which has grown the most, and which a sagacious man might perhaps have foreseen would so expand, is the legislative. *Miller's Const.*, p. 95.

The judicial branch is the weakest of all. It has no army. It has no navy, and it has no purse. It has no officers, except its marshals, and they are appointed by the President and confirmed by the Senate. They are the officials to whom its processes are sent, but they may be removed at any time by the Executive. *Miller's Const.*, p. 96.

Montesquieu said that the English constitution would perish when the legislative power becomes more corrupt than the executive.

Montesquieu says: “The judiciary is the weakest of the three departments of the government.” *Millers Const.*, note, p. 96.

Rhode Island declined to ratify the Constitution, because it granted Congress the power to regulate commerce. Its favorable ports were a great source of revenue, which it did not desire to lose. *Miller's Const.*, pp. 8, 9.

Among the most serious objections to the ratification, were (1) the absence of a bill of rights; (2) That the States were not on an equal footing, the larger ones having more representatives in the lower house, and more power as to the election of a president and vice-president. (3) That the Executive power was vested in one individual, in whom was vested powers too great, that it would prevent a free government. That the right to appoint all officers and to succeed himself, would lead to monarchy. This objection is the most plausible of all, and no doubt affords the means of destroying a free government, especially in time of war. He then controls the army and navy, and the treasury. He then holds the sword and



purse. To oppose any of his policies or acts, renders those who do so, no matter what their authority or office may be, to be denominated as traitors and enemies of the government, and renders them liable to be proceeded against as such, no matter how pure their motives, or how free from traitorous conduct. In times of war Congress practically surrenders the law making power to the president, and the armies acting under him practically usurp the powers and functions of the judiciary.

The people of all the States were divided into two classes; one which desired a strong central government, with extensive and sovereign powers; the other who desired a mere Confederacy or federation of States, with but few and very limited sovereign powers. The Constitution was a compromise between the two. Before it was adopted its enemies claimed to the one class that the government was too weak and puerile to be of any benefit, and to the other that it was too strong and unlimited in its powers, and would destroy the States.

After the Constitution was adopted the one class were known as Federalists, the other as Republican; later they were known as Unionists and States Rights, and now as Republicans and Democrats.

### Bills or Declarations of Rights.

It seems that Mr. Madison submitted to Mr. Jefferson, the first batch of amendments to the Constitution, which were to take the place of the overruled bill of rights in the original constitution, and the following are his comments:

I must now say a word on the declaration of rights, you have been so good as to send me. I like it, as far as it goes; but I should have been for going further. For instance, the following alterations and additions would have pleased me: Article 4. "The people shall not be deprived of their right to speak, to write, or *otherwise* to publish anything but false facts affecting injuriously the life, liberty, property or reputation of others, or affecting the peace of the confederacy with foreign nations. Article 7. All facts put in issue before any judicature, shall be tried by jury, except, 1, in cases of admiralty jurisdiction, wherein a foreigner shall be interested; 2, in cases cognizable before a court martial, concerning only the regular officers, and soldiers of the United States, or members of the militia in actual service in time of war or insurrection; and 3, in impeachments allowed by the constitution. Article 8. No person shall be held in confinement more than—days after he shall have demanded and been refused a writ of habeas corpus by the judge appointed by law, nor more than—days after such writ shall have been served on the person holding him in confinement, and no order given on due examination for his remandment or

discharge, nor more than—hours in any place at a greater distance than—miles from the usual residence of some judge authorized to issue the writ of habeas corpus; nor shall that writ be suspended for any term exceeding one year, nor in any place more than—miles distant from the State or encampment of enemies or of insurgents. Article 9. Monopolies may be allowed to persons for their own productions in literature, and their own inventions in the arts, for a term not exceeding— years, but for no longer term, and no other purpose. Article 10. All troops of the United States shall stand *ipso facto* disbanded, at the expiration of the term for which their pay and subsistence shall have been voted by Congress, and all officers and soldiers, not natives of the United States, shall be incapable of serving in their armies by land, except during a foreign war." These restrictions I think are so guarded, as to hinder evil only. However, if we do not have them now, I have so much confidence in my countrymen, as to be satisfied that we shall have them as soon as the degeneracy of our government shall render them necessary. † *Jefferson's Writings, (mem. ed.), pp. 450, 451, 452.*

On March 15, 1789, Mr. Jefferson wrote Mr. Madison, relative to the first amendments to the Constitution, which were to take the place of a bill of rights, omitted from the original; among the good things he said, I quote the following:

In the arguments in favor of a declaration of rights, you omit one which has great weight with me; the legal check which it puts into the hands of the judiciary. This is a body, which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity. In fact, what degree of confidence would be too much, for a body composed of such men as Wythe, Blair and Pendleton? On characters like these, the "*civium ardor parva jubentium*" would make no impression. I am happy to find that, on the whole, you are a friend to this amendment. The declaration of rights is, like all other human blessings, alloyed with some inconveniences, and not accomplishing fully its object. But the good in this instance, vastly overweighs the evil. I can not refrain from making short answers to the objections which your letter states to have been raised. 1. That the rights in question are reserved, by the manner in which the Federal powers are granted. Answer. A constitutive act may, certainly, be so formed, as to need no declaration of rights. The act itself has the force of a declaration, as far as it goes; and if it goes to all material points, nothing more is wanting. In the draught of a constitution which I had once a thought of proposing in Virginia, and printed afterwards, I endeavored to reach all the great objects of public liberty, and did not mean to add a declaration of rights. Probably the object was imperfectly executed; but the deficiencies would have been supplied by others, in the course of discussion. But in a constitutive act which leaves some precious articles unnoticed, and raises implications against others, a declaration of rights becomes necessary, by way of supplement. This is the case of our new Federal Constitution. This instrument forms us into one State, as to certain objects, and gives us a legislative and executive body for these objects. It should, therefore,

guard us against their abuses of power, within the field submitted to them. 2. A positive declaration of some essential rights could not be obtained in the requisite latitude. Answer. Half a loaf is better than no bread. If we can not secure all our rights, let us secure what we can. 3. The limited powers of the Federal government, and jealousy of the subordinate governments, afford a security which exists in no other instance. Answer. The first member of this seems resolvable into the first objection before stated. The jealousy of the subordinate governments is a precious reliance. But observe that those governments are only agents. They must have principles furnished them, whereon to found their opposition. The declaration of rights will be the text, whereby they will try all the acts of the Federal government. In this view, it is necessary to the Federal government also; as by the same text, they may try the opposition of the subordinate governments. 4. Experience proves the inefficacy of a bill of rights. True. But though it is not absolutely efficacious under all circumstances, it is of great potency always, and rarely inefficacious. A brace the more will often keep up the building which would have fallen, with that brace the less. There is a remarkable difference between the characters of the inconveniences which attend a declaration of rights, and those which attend the want of it. The inconveniences of the declaration are, that it may cramp governments in its useful exertions. But the evil of this is short-lived, moderate and reparable. The inconveniences of the want of a declaration are permanent, afflicting and irreparable. They are in constant progression from bad to worse. The executive, in our governments, is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the legislatures is the most formidable dread at present, and will be for many years. That of the executive will come in its turn; but it will be at a remote period. I know there are some among us, who would establish a monarchy. But they are inconsiderable in number and weight of character. The rising race are all republicans. We were educated in royalism; no wonder, if some of us retain the idolatry still. Our young people are educated in republicanism; an apostasy from that to royalism, is unprecedented and impossible. I am much pleased with the prospect that a declaration of rights will be added; and I hope it will be done in that way, which will not endanger the whole frame of government, or any essential part of it. *7 Jefferson's Writings. (mem. ed.) pp. 309, 310, 311 and 312.*

Mr. Madison thus wrote Mr. Jefferson as to the propriety of a bill of Rights in the Constitution:

What use, then, it may be asked, can a bill of rights serve in popular Government? I answer, the two following, which, though less essential than in other Governments, sufficiently recommend the precaution: 1. The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the National sentiment, counteract the impulses of interest and passion. 2. Although it be generally true, as above stated, that the danger of oppression lies in the interested majorities of the people rather than in usurped acts of the

Government, yet there may be occasions on which the evil may spring from the latter source; and on such, a bill of rights will be a good ground for an appeal to the sense of the community. Perhaps, too, there may be a certain degree of danger that a succession of artful and ambitious rulers may, by gradual and well-timed advances, finally erect an independent Government on the subversion of liberty. Should this danger exist at all, it is prudent to guard against it, especially when the precaution can do no injury. *1 Writings of Madison, p. 426.*

Mr. Hamilton,<sup>1</sup> replying to the objection that the Constitution contains no bill or declaration of rights, argues that it was entirely unnecessary, because in reality the people—that is, of course, the people, respectively, of the several States, who were the only people known to the Constitution or to the country—had surrendered nothing of their inherent sovereignty, but retained it unimpaired. He says: "Here, in strictness, the people *surrender nothing*; and, as they retain *everything*, they have no need of particular reservations." And again: "I go further, and affirm that bill of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed Constitution, but would be absolutely dangerous. They would contain various exceptions to *powers not granted*, and on this very account would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done, which there is no danger to do?" Could language be more clear or more complete in vindication of the principles laid down in this work? Mr. Hamilton declares, in effect, that the grants to the Federal Government in the Constitution are not surrenders, but delegations of power where it was before; and that the delegations of power were strictly limited to those expressly granted—in this, merely anticipating the tenth amendment, afterward adopted. *Davis on The Rise and Fall of the Confederate Government, Vol. I, 163.*

A bill of rights is a formal declaration, in a constitution, of the fundamental natural, civil, and political rights of the people which are to be secured and protected by the government.<sup>2</sup> *Black on Constitutional Laws, 10.*

Judge Dillon thus speaks on the subject:

"This distinction," said the Supreme Court in *Poindexter v. Greenhow*, 114 U. S. Rep., 270, 291," is essential to the idea of constitutional Government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent

<sup>1</sup>Mr. Hamilton was opposed to a bill of rights. In the *Federalist* No. 84, he treats the subject at length. He argued that one could not enumerate all the reserved rights and hence, it might be construed to be a denial of those not enumerated. This was avoided at the suggestion of Jefferson and Madison by having one of the bills to provide that the enumeration of the

rights so reserved should not be construed to be a denial of others not so enumerated.

<sup>2</sup>It is in the nature both of the reservation and a covenant. The grantor, the people, reserve the rights to themselves and their descendants, and the grantee, the government, covenants to defend and secure them to the grantors and their successors.



of the State to declare and decree that he is the State; to say, 'L'Etat c'est moi.' Of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them; and that too with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders who are the instruments of wrong, when they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their existence is not compatible with it. It is the doctrine of absolutism, pure, simple and naked; and of communism which is its twin,—the double progeny of the same evil birth." *Judge Dillon's Lectures, The Laws and Jurisprudence of England and America, 228.*

Judge Story thus speaks of their importance :

In the first place, a bill of rights, in the very sense of this reasoning, is admitted in some cases to be important; and the Constitution itself adopts and establishes its propriety to the extent of its actual provisions. Every reason which establishes the propriety of any provision of this sort in the Constitution, such as a right of trial by jury in criminal cases, is, *pro tanto*, proof that it is neither unnecessary nor dangerous. It reduces the question to the consideration, not whether any bill of rights is necessary, but what such a bill of rights should properly contain. *Story on the Constitution, Vol V, p. 624, § 1863.*

In the next place a bill of rights is important, and may often be indispensable, whenever it operates as a qualification upon powers actually granted by the people to the government. This is the real ground of all the bills of rights in the parent country, in the colonial constitutions and laws, and in the State constitutions. In England, the bills of rights were not demanded merely of the crown, as withdrawing a power from the royal prerogative; they were equally important, as withdrawing power from Parliament. A large proportion of the most valuable of the provisions in the Magna Charta, and the Bill of Rights in 1688, consists of a solemn recognition of limitations upon the power of Parliament; that is, a declaration that Parliament *ought not* to abolish or restrict these rights. *Story on the Constitution, Vol. V, p. 624-5, § 1864.*

A bill of rights, then, operates as a guard upon an extravagant or undue extension of such powers. Besides, as has been justly remarked, a bill of rights is of real efficiency in controlling the excesses of party spirit. It serves to guide and enlighten public opinion, and to render it more quick to detect, and more resolute to resist, attempts to disturb private rights. It requires more than ordinary hardihood and audacity of character to trample down principles which our ancestors have consecrated with reverence; which we imbibed in our early education; which

recommend themselves to the judgment of the world by their truth and simplicity; and which are constantly placed before the eyes of the people, accompanied with the imposing force and solemnity of a constitutional sanction. Bills of right are a part of the muniments of freemen, showing their title to protection; and they become of increased value when placed under the protection of an independent judiciary instituted as the appropriate guardian of the public and private rights of the citizens. *Story on the Constitution, Vol. V, p. 625-6, § 1865.*

Judge Black speaks as follows:

Almost without exception, the great guaranties which secure the natural, civil, and political rights of the citizen, and protect him against tyranny or oppression, were derived from the great charters and legislative enactments of Great Britain which had become a fixed part of her constitution, or from the common law, which the Americans claimed as their natural heritage and shield. Among these rights we may mention that of "due process of law," of trial by jury, of the benefit of the writ of habeas corpus, of security against unreasonable searches and seizures, and many of the rights secured to persons on trial for criminal offenses. The several states, in framing their constitutions, have been guided and influenced by the same theories and doctrines, and by the prevalence of the same political ideas among the people, and also in later times, and to a very considerable degree, by the constitution of the United States. *Black on Constitutional Laws, 9-10.*

The idea, as well as the name, of a bill of rights, was undoubtedly suggested by certain great charters of liberty well known in English constitutional history, and particularly the "Bill of Rights" passed in the first year of the reign of William and Mary, A. D. 1689. *Black on Constitutional Laws, 11.*

Mr. Hamilton was opposed to a bill of rights<sup>1</sup> in the Constitution. He discusses the subject in Number LXXXIV of *The Federalist*, and among other things said:

I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against

<sup>1</sup>The first ten amendments to the Federal Constitution form its Bill of Rights. The Constitution never would have been ratified but for the fact that the friends of the Constitution agreed

among themselves, and promised those who opposed it, that as soon as practicable it would be amended so as to contain a Bill of Rights.

restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights. *Hamilton in The Federalist, Vol. II, Number LXXXIV.*

### **The Political Chart for the American Ship of State**

Washington's farewell address and Thomas Jefferson's first inaugural address have always been looked upon as a kind of political chart for the guidance of the American ship of state. No state papers have ever received more attention or have been held in higher veneration by the American statesmen to whom the guidance of the American Government has been intrusted than these two documents.

For this reason the compiler has deemed it proper to set out these two great state papers for ready reference by those who may desire to study or refer to them.

Next to them in importance may be considered the Monroe Doctrine.—officially and authentically announced by Mr. Monroe during the second term of his administration. The originator of the principles and thought announced in this doctrine has been, by historians, ascribed to quite a number of different statesmen. It is the opinion of the compiler that the doctrine was the natural growth or outcome of Washington's farewell address and Thomas Jefferson's inaugural address, which the occasion and condition prevailing during Monroe's administration rendered necessary to formulate the thought and principles into a specific declaration.

The correspondence between President Monroe and Mr. Jefferson and Mr. Adams reveals that the subject was discussed by these three men. Monroe applied to both Mr. Jefferson and Mr. Madison for their advice as to the proper course for him to pursue as the best American policy under the then existing conditions as to the relations of the United States of America to other nations. Replies of Mr. Jefferson and Mr. Madison to these requests of President Monroe contain the clearest, and most succinct definitions of the Monroe Doctrine that have ever been announced. The principles and doctrines are more succinctly and more clearly stated in these letters of Mr. Jefferson and Mr. Madison to President Monroe than they are even in the proclamation of Mr. Monroe, which first announced the doctrine, and from which it received its name. The doctrine as finally announced in this proclamation

was no doubt either drafted by or revised by Mr. J. Q. Adams who was then President Monroe's Secretary of State, and who was his successor as president. The doctrine, however, as it has been interpreted is not so well expressed by Mr. Adams or Mr. Monroe as was done by Mr. Jefferson or Mr. Madison. The compiler wishes it were practicable to set out this correspondence in full as it certainly enables one to more clearly understand the doctrine than can be done from any other source which the compiler has been able to find.

### **George Washington's Farewell Address**

United States, September 17, 1796.

*Friends and Fellow-Citizens:*

The period for a new election of a citizen to administer the Executive Government of the United States being not far distant, and the time actually arriving when your thoughts must be employed in designating the person who is to be clothed with that important trust, it appears to me proper, especially as it may conduce to a more distant expression of the public voice, that I should now apprise you of the resolution I have formed to decline being considered among the number of those out of whom a choice is to be made.

I beg you at the same time to do me the justice to be assured that this resolution has not been taken without a strict regard to all the considerations appertaining to the relation which binds a dutiful citizen to his country; and that in withdrawing the tender of service, which silence in my situation might imply, I am influenced by no diminution of zeal for your future interest, no deficiency of grateful respect for your past kindness, but am supported by a full conviction that the step is compatible with both.

The acceptance of and continuance hitherto in the office to which your suffrages have twice called me have been a uniform sacrifice of inclination to the opinion of duty and to a deference for what appeared to be your desire. I constantly hoped that it would have been much earlier in my power, consistently with motives which I was at liberty to disregard, to return to that retirement from which I had been reluctantly drawn. The strength of my inclination to do this previous to the last election had even led to the preparation of an address to declare it to you; but mature reflection on the then perplexed and critical posture of our affairs with foreign nations and the unanimous advice of persons entitled to my confidence impelled me to abandon the idea. I rejoice that the state of your concerns, external as well as internal, no longer renders the pursuit of inclination incompatible with the sentiment of duty or propriety, and am persuaded, whatever partiality may be retained for my services, that in the present circumstances of our country you will not disapprove my determination to retire.

The impressions with which I first undertook the arduous trust were explained on the proper occasion. In the discharge of this trust I will only say that I have, with good intentions, contributed toward the organization and administration of the Government the best exertions of which a very fallible judgment was capable. Not unconscious in the



outset of the inferiority of my qualifications, experience in my own eyes, perhaps still more in the eyes of others, has strengthened the motives to diffidence of myself; and every day the increasing weight of years admonishes me more and more that the shade of retirement is as necessary as it will be welcome. Satisfied that if any circumstances have given peculiar value to my services they are temporary, I have the consolation to believe that, while choice and prudence invite me to quit the political scene, patriotism does not forbid it.

In looking forward to the moment which is intended to terminate the career of my political life my feelings do not permit me to suspend the deep acknowledgment of that debt of gratitude which I owe to my beloved country for the many honors conferred upon me; still more for the steady confidence with which it has supported me, and for the opportunities I have thence enjoyed of manifesting my inviolable attachment by services faithful and persevering, though in usefulness unequalled to my zeal. If benefits have resulted to our country from these services, let it always be remembered to your praise and as an instructive example in our annals that under circumstances in which the passions, agitated in every direction, were liable to mislead; amidst appearances sometimes dubious; vicissitudes of fortune often discouraging; in situations in which not unfrequently want of success has countenanced the spirit of criticism, the constancy of your support was the essential prop of the efforts and a guaranty of the plans by which they were effected. Profoundly penetrated with this idea, I shall carry it with me to my grave as a strong incitement to unceasing vows that Heaven may continue to you the choicest tokens of its beneficence; that your union and brotherly affection may be perpetual; that the free Constitution which is the work of your hands may be sacredly maintained; that its administration in every department may be stamped with wisdom and virtue; that, in fine, the happiness of the people of these States, under the auspices of liberty, may be made complete by so careful a preservation and so prudent a use of this blessing as will acquire to them the glory of recommending it to the applause, the affection, and adoption of every nation which is yet a stranger to it.

Here, perhaps, I ought to stop. But solicitude for your welfare which can not end with my life, and the apprehension of danger natural at that solicitude, urge me on an occasion like the present to offer to your solemn contemplation and to recommend to your frequent review some sentiments which are the result of much reflection, of no inconsiderable observation, and which appear to me all important to the permanency of your felicity as a people. These will be offered to you with the more freedom as you can only see in them the disinterested warnings of a parting friend, who can possibly have no personal motive to bias his counsel. Nor can I forget as an encouragement to it your indulgent reception of my sentiments on a former and not dissimilar occasion.

Interwoven as is the love of liberty with every ligament of your hearts, no recommendation of mine is necessary to fortify or confirm the attachment.

The unity of government which constitutes you one people is also now dear to you. It is justly so, for it is a main pillar in the edifice of your real independence, the support of your tranquillity at home,

your peace abroad, of your safety, of your prosperity, of that very liberty which you so highly prize. But as it is easy to foresee that from different causes and from different quarters much pains will be taken, many artifices employed, to weaken in your minds the conviction of this truth, as this is the point in your political fortress against which the batteries of internal and external enemies will be most constantly and actively (though often covertly and insidiously) directed, it is of infinite moment that you should properly estimate the immense value of your national union to your collective and individual happiness; that you should cherish a cordial, habitual, and immovable attachment to it; accustoming yourselves to think and speak of it as of the palladium of your political safety and prosperity; watching for its preservation with jealous anxiety; discountenancing whatever may suggest even a suspicion that it can in any event be abandoned, and indignantly frowning upon the first dawning of every attempt to alienate any portion of our country from the rest or to enfeeble the sacred ties which now link together the various parts.

For this you have every inducement or sympathy and interest. Citizens by birth or choice of a common country, that country has a right to concentrate your affections. The name of American, which belongs to you in your natural capacity, must always exalt the just pride of patriotism more than any appellation derived from local discriminations. With slight shades of difference, you have the same religion, manners, habits, and political principles. You have in a common cause fought and triumphed together. The independence and liberty you possess are the work of joint councils and joint efforts, of common dangers, sufferings, and successes.

But these considerations, however powerfully they address themselves to your sensibility, are greatly outweighed by those which apply more immediately to your interest. Here every portion of our country finds the most commanding motives for carefully guarding and preserving the union of the whole.

The *North*, in an unrestrained intercourse with the South, protected by the equal laws of a common government, finds in the productions of the latter great additional resources of maritime and commercial enterprise and precious materials of manufacturing industry. The *South*, in the same intercourse, benefiting by the same agency of the *North*, sees its agriculture grow and its commerce expand. Turning partly into its own channels the seamen of the *North*, it finds its particular navigation invigorated; and while it contributes in different ways to nourish and increase the general mass of the national navigation, it looks forward to the protection of a maritime strength to which itself is unequally adapted. The *East*, in a like intercourse with the *West*, already finds, and in the progressive improvement of interior communications by land and water will more and more find, a valuable vent for the commodities which it brings from abroad or manufactures at home. The *West* derives from the *East* supplies requisite to its growth and comfort, and what is perhaps of still greater consequence, it must of necessity owe the *secure* enjoyment of indispensable *outlets* for its own productions to the weight, influence, and the future maritime strength of the Atlantic side of the Union, directed by an indissoluble community of interest as *one nation*. Any other tenure by

which the *West* can hold this essential advantage, whether derived from its own separate strength or from an apostate and unnatural connection with any foreign power, must be intrinsically precarious.

While, then, every part of our country thus feels an immediate and particular interest in union, all the parts combined can not fail to find in the united mass of means and efforts greater strength, greater resource, proportionably greater security from external danger, a less frequent interruption of their peace by foreign nations, and what is of inestimable value, they must derive from union an exemption from those broils and wars between themselves which so frequently afflict neighboring countries not tied together by the same governments, which their own rivalships alone would be sufficient to produce, but which opposite foreign alliances, attachments, and intrigues would stimulate and embitter. Hence, likewise, they will avoid the necessity of those overgrown military establishments which, under any form of government, are inauspicious to liberty, and which are to be regarded as particularly hostile to republican liberty. In this sense it is that your union ought to be considered as a main prop of your liberty, and that the love of the one ought to endear to you the preservation of the other.

These considerations speak a persuasive language to every reflecting and virtuous mind, and exhibit the continuance of the union as a primary object of patriotic desire. Is there a doubt whether a common government can embrace so large a sphere? Let experience solve it. To listen to mere speculation in such a case were criminal. We are authorized to hope that a proper organization of the whole, with the auxiliary agency of governments for the respective subdivisions, will afford a happy issue to the experiment. It is well worth a fair and full experiment. With such powerful and obvious motives to union affecting all parts of our country, while experience shall not have demonstrated its impracticability, there will always be reason to distrust the patriotism of those who in any quarter may endeavor to weaken its bands.

In contemplating the causes which may disturb our union it occurs as matter of serious concern that any ground should have been furnished for characterizing parties by geographical discriminations—*Northern* and *Southern*, *Atlantic* and *Western*—whence designing men endeavor to excite a belief that there is a real difference of local interests and views. One of the expedients of party to acquire influence within particular districts is to misrepresent the opinions and aims of other districts. You can not shield yourselves too much against the jealousies and heart-burnings which spring from these misrepresentations; they tend to render alien to each other those who ought to be bound together by fraternal affection. The inhabitants of our Western country have lately had a useful lesson on this head. They have seen in the negotiation by the Executive and in the unanimous ratification by the Senate of the treaty with Spain, and in the universal satisfaction at that event throughout the United States, a decisive proof how unfounded were the suspicions propagated among them of a policy in the General Government and in the Atlantic States unfriendly to their interests in regard to the Mississippi. They have been witnesses to the formation of two treaties—that with Great Britain and that with Spain

—which secure to them everything they could desire in respect to our foreign relations toward confirming their prosperity. Will it not be their wisdom to rely for the preservation of these advantages on the union by which they were procured? Will they not henceforth be deaf to those advisers, if such there are, who would sever them from their brethren and connect them with aliens?

To the efficacy and permanency of your union a government for the whole is indispensable. No alliances, however strict, between the parts can be an adequate substitute. They must inevitably experience the infractions and interruptions which all alliances in all times have experienced. Sensible of this momentous truth, you have improved upon your first essay by the adoption of a Constitution of Government better calculated than your former for an intimate union and for the efficacious management of your common concerns. This Government, the offspring of our own choice, uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and your support. Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true liberty. The basis of our political systems is the right of the people to make and to alter their constitutions of government. But the constitution which at any time exists till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all. The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government.

All obstructions to the execution of the laws, all combinations and associations, under whatever plausible character, with the real design to direct, counteract, or awe the regular deliberation and action of the constituted authorities, are destructive of this fundamental principle and of fatal tendency. They serve to organize faction; to give it an artificial and extraordinary force; to put in the place of the delegated will of the nation the will of a party, often a small but artful and enterprising minority of the community, and, according to the alternate triumphs of different parties, to make the public administration the mirror of the ill-concerted and incongruous projects of faction rather than the organ of consistent and wholesome plans, digested by common counsels and modified by mutual interests.

However combinations or associations of the above description may and now and then answer popular ends, they are likely in the course of time and things to become potent engines by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people, and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion.

Toward the preservation of your Government and the permanency of your present happy state, it is requisite not only that you steadily discountenance irregular oppositions to its acknowledged authority, but also that you resist with care the spirit of innovation upon its principles however specious the pretexs. One method of assault may be to effect in the forms of the Constitution alterations which will impair



the energy of the system, and thus to undermine what can not be directly overthrown. In all the changes to which you may be invited remember that time and habit are at least as necessary to fix the true character of governments as of other human institutions; that experience is the surest stay of a country; that facility in changes upon the credit of mere hypothesis and opinion exposes to perpetual change, from the endless variety of hypothesis and opinion; and remember especially that for the efficient management of your common interests in a country so extensive as ours a government of as much vigor as is consistent with the perfect security of liberty is indispensable. Liberty itself will find in such a government, with powers properly distributed and adjusted, its surest guardian. It is, indeed, little else than a name where the government is too feeble to withstand the enterprises of faction, to confine each member of the society within the limits prescribed by the laws, and to maintain all in the secure and tranquil enjoyment of the rights of person and property.

I have already intimated to you the danger of parties in the State, with particular reference to the founding of them on geographical discriminations. Let me now take a more comprehensive view, and warn you in the most solemn manner against the baneful effects of the spirit of party generally.

This spirit, unfortunately, is inseparable from our nature, having its root in the strongest passions of the human mind. It exists under different shapes in all governments, more or less stifled, controlled, or repressed; but in those of the popular form it is seen in its greatest rankness and is truly their worst enemy.

The alternate domination of one faction over another, sharpened by the spirit of revenge natural to party discussion, which in different ages and countries has perpetrated the most horrid animosities, is itself a frightful despotism. But this leads at length to a more formal and permanent despotism. The disorders and miseries which result gradually incline the minds of men to seek security and repose in the absolute power of an individual, and sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation on the ruins of public liberty.

Without looking forward to an extremity of this kind (which nevertheless ought not to be entirely out of sight), the common and continual mischiefs of the spirit of party are sufficient to make it the interest and duty of a wise people to discourage and restrain it.

It serves always to distract the public councils and enfeebles the public administration. It agitates the community with ill-founded jealousies and false alarms; kindles the animosity of one part against another; fomented occasionally riot and insurrection. It opens the door to foreign influence and corruption, which find a facilitated access to the government itself through the channels of party passion. Thus the policy and the will of one country are subject to the policy and will of another.

There is an opinion that parties in free countries are useful checks upon the administration of the government, and serve to keep alive the spirit of liberty. This within certain limits is probably true; and in governments of a monarchical cast patriotism may look with indulgence, if not with favor, upon the spirit of party. But in those

of the popular character, in governments purely elective, it is a spirit not to be encouraged. From their natural tendency it is certain there will always be enough of that spirit for every salutary purpose; and there being constant danger of excess, the effort ought to be by force of public opinion to mitigate and assuage it. A fire not to be quenched, it demands a uniform vigilance to prevent its bursting into a flame, lest, instead of warming, it should consume.

It is important, likewise, that the habits of thinking in a free country should inspire caution in those intrusted with its administration to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power and proneness to abuse it which predominates in the human heart is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each guardian of the public weal against invasions by the others, has been evinced by experiments ancient and modern, some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them. If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any particular or transient benefit which the use can at any time yield.

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who would labor to subvert these great pillars of human happiness—these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked, Where is the security for property, for reputation, for life, if the sense of religious obligation *desert* the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

It is substantially true that virtue or morality is a necessary spring of popular government. The rule extends with more or less force to every species of free government. Who that is a sincere friend to it can look with indifference upon attempts to shake the foundation of the fabric? Promote, then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.

As a very important source of strength and security, cherish public credit. One method of preserving it is to use it as sparingly as possible, avoiding occasions of expense by cultivating peace, but remembering also that timely disbursements to prepare for danger frequently prevent much greater disbursements to dispel it; avoiding likewise the accumulation of debt, not only by shunning occasions of expense, but by vigorous exertions in time of peace to discharge the debts which unavoidable wars have occasioned, not ungenerously throwing upon posterity the burthen which we ourselves ought to bear. The execution of these maxims belongs to your representatives; but it is necessary that public opinion should co-operate. To facilitate to them the performance of their duty it is essential that you should practically bear in mind that toward the payment of debts there must be revenue; that to have revenue there must be taxes; that no taxes can be devised which are not more or less inconvenient and unpleasant; that the intrinsic embarrassment inseparable from the selection of the proper objects (which is always a choice of difficulties), ought to be a decisive motive for a candid construction of the conduct of the Government in making it, and for a spirit of acquiescence in the measures for obtaining revenue which the public exigencies may at any time dictate.

Observe good faith and justice toward all nations. Cultivate peace and harmony with all. Religion and morality enjoin this conduct. And can it be that good policy does not equally enjoin it? It will be worthy of a free, enlightened, and at no distant period a great nation to give to mankind the magnanimous and too novel example of a people always guided by an exalted justice and benevolence. Who can doubt that in the course of time and things the fruits of such a plan would richly repay any temporary advantages which might be lost by a steady adherence to it? Can it be that Providence has not connected the permanent felicity of a nation with its virtue? The experiment, at least, is recommended by every sentiment which ennobles human nature. Alas! is it rendered impossible by its vices?

In the execution of such a plan nothing is more essential than that permanent, inveterate antipathies against particular nations and passionate attachments for others should be excluded, and that in place of them just and amicable feelings toward all should be cultivated. The nation which indulges toward another an habitual hatred or an habitual fondness is in some degree a slave. It is a slave to its animosity or to its affection, either of which is sufficient to lead it astray from its duty and its interest. Antipathy in one nation against another disposes each more readily to offer insult and injury, to lay hold of slight causes of umbrage, and to be haughty and intractable when accidental or trifling occasions of dispute occur.

Hence frequent collisions, obstinate, envenomed, and bloody contests. The nation prompted by ill will and resentment sometimes impels to war the government contrary to the best calculations of policy. The government sometimes participates in the national propensity, and adopts through passion what reason would reject. At other times it makes the animosity of the nation subservient to projects of hostility, instigated by pride, ambition, and other sinister and pernicious motives. The peace, often, sometimes perhaps the liberty of nations has been the victim.

So, likewise, a passionate attachment of one nation for another produces a variety of evils. Sympathy for the favorite nation, facilitating the illusion of an imaginary common interest in cases where no real common interest exists, and infusing into one the enmities of the other, betrays the former into a participation in the quarrels and wars of the latter without adequate inducement or justification. It leads also to concessions to the favorite nation of privileges denied to others, which is apt doubly to injure the nation making the concessions by unnecessarily parting with what ought to have been retained, and by exciting jealousy, ill will, and a disposition to retaliate in the parties from whom equal privileges are withheld; and it gives to ambitious, corrupted, or deluded citizens (who devote themselves to the favorite nation) facility to betray or sacrifice the interests of their own country without odium, sometimes even with popularity, gilding with the appearances of a virtuous sense of obligation, a commendable deference for public opinion, or a laudable zeal for public good the base or foolish compliances or ambition, corruption, or infatuation.

As avenues to foreign influence in innumerable ways, such attachments are particularly alarming to the truly enlightened and independent patriot. How many opportunities do they afford to tamper with domestic factions, to practice the arts of seduction, to mislead public opinion, to influence or awe the public councils! Such an attachment of a small or weak toward a great and powerful nation dooms the former to be the satellite of the latter. Against the insidious wiles of foreign influence (I conjure you to believe me, fellow citizens) the jealousy of a free people ought to be *constantly* awake, since history and experience prove that foreign influence is one of the most baneful foes of republican government. But that jealousy, to be useful, must be impartial, else it becomes the instrument of the very influence to be avoided, instead of a defense against it. Excessive partiality for one foreign nation and excessive dislike of another cause those whom they actuate to see danger only on one side, and serve to veil and even second the arts of influence on the other. Real patriots who may resist the intrigues of the favorite are liable to become suspected and odious, while its tools and dupes usurp the applause and confidence of the people to surrender their interests.

The great rule of conduct for us to regard to foreign nations is, in extending our commercial relations to have with them as little *political* connection as possible. So far as we have already formed engagements let them be fulfilled with perfect good faith. Here let us stop.

Europe has a set of primary interests which to us have none or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics or the ordinary combinations and collisions of her friendships or enmities.

Our detached and distant situation invites and enables us to pursue a different course. If we remain one people, under an efficient government, the period is not far off when we may defy material injury from external annoyance; when we may take such an attitude as will cause the neutrality we may at any time resolve upon to be scrupulously respected; when belligerent nations, under the impossibility of making



acquisitions upon us, will not lightly hazard the giving us provocation; when we may choose peace or war, as our interest, guided by justice, shall counsel.

Why forego the advantages of so peculiar a situation? Why quit our own to stand upon foreign ground? Why, by interweaving our destiny with that of any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalry, interest, humor or caprice?

It is our true policy to steer clear of permanent alliances with any portion of the foreign world, so far, I mean, as we are now at liberty to do it; for let me not be understood as capable of patronizing infidelity to existing engagements. I hold the maxim no less applicable to public than to private affairs that honesty is always the best policy. I repeat, therefore, let those engagements be observed in their genuine sense. But in my opinion it is unnecessary and would be unwise to extend them.

Taking care always to keep ourselves by suitable establishments on a respectable defensive posture, we may safely trust to temporary alliances for extraordinary emergencies.

Harmony, liberal intercourse with all nations are recommended by policy, humanity, and interest. But even our commercial policy should hold an equal and impartial hand, neither seeking nor granting exclusive favors or preferences; consulting the natural course of things; diffusing and diversifying by gentle means the streams of commerce, but forcing nothing; establishing with powers so disposed, in order to give trade a stable course, to define the rights of our merchants, and to enable the Government to support them, conventional rules of intercourse, the best that present circumstances and mutual opinion will permit, but temporary and liable to be from time to time abandoned or carried as experience and circumstances shall dictate; constantly keeping in view that it is folly in one nation to look for disinterested favors from another; that it must pay with a portion of its independence for whatever it may accept under this character; that by such acceptance it may place itself in the condition of having given equivalents for nominal favors, and yet of being reproached with ingratitude for not giving more. There can be no greater error than to expect or calculate upon real favors from nation to nation. It is an illusion which experience must cure, which a just pride ought to discard.

In offering to you, my countrymen, these counsels of an old and affectionate friend I dare not hope they will make the strong and lasting impression I could wish—that they will control the usual current of the passions or prevent our nation from running the course which has hitherto marked the destiny of nations. But if I may even flatter myself that they may be productive of some partial benefit, some occasional good—that they may now and then recur to moderate the fury of party spirit, to warn against the mischiefs of foreign intrigue, to guard against the impostures of pretended patriotism—this hope will be a full recompense for the solicitude for your welfare by which they have been dictated.

How far in the discharge of my official duties I have been guided by the principles which have been delineated the public records and

other evidences of my conduct must witness to you and to the world. To myself, the assurance of my own conscience is that I have at least believed myself to be guided by them.

In relation to the still subsisting war in Europe my proclamation of the 22d of April, 1793, is the index to my plan. Sanctioned by your approving voice and by that of your representatives in both Houses of Congress, the spirit of that measure has continually governed me, uninfluenced by any attempts to deter or divert me from it.

After deliberate examination, with the aid of the best lights I could obtain, I was well satisfied that our country, under all the circumstances of the case, had a right to take, and was bound in duty and interest to take, a neutral position. Having taken it, I determined as far as should depend upon me to maintain it with moderation, perseverance and firmness.

The considerations which respect the right to hold this conduct it is not necessary on this occasion to detail. I will only observe that, according to my understanding of the matter, it has been virtually admitted by all.

The duty of holding a neutral conduct may be inferred, without anything more, from the obligation which justice and humanity impose on every nation, in cases in which it is free to act, to maintain inviolate the relations of peace and amity toward other nations.

The inducements of interest for observing that conduct will best be referred to your own reflections and experience. With me a predominant motive has been to endeavor to gain time to our country to settle and mature its yet recent institutions, and to progress without interruption to that degree of strength and consistency which is necessary to give it, humanly speaking, the command of its own fortunes.

Though in reviewing the incidents of my Administration I am unconscious of intentional error, I am nevertheless too sensible of my defects not to think it probable that I may have committed many errors. Whatever they may be, I fervently beseech the Almighty to avert or mitigate the evils to which they may tend. I shall also carry with me the hope that my country will never cease to view them with indulgence, and that, after forty-five years of my life dedicated to its service with an upright zeal, the faults of incompetent abilities will be consigned to oblivion, as myself must soon be to the mansions of rest.

Relying on its kindness in this as in other things, and actuated by that fervent love toward it which is so natural to a man who views in it the native soil of himself and his progenitors for several generations, I anticipate with pleasing expectation that retreat in which I promise myself to realize without alloy the sweet enjoyment of partaking in the midst of my fellow-citizens the benign influence of good laws under a free government—the ever-favorite object of my heart, and the happy reward, as I trust, of our mutual cares, labors, and dangers.

GEORGE WASHINGTON.

### **First Inaugural Address of Thomas Jefferson**

#### *Friends and Fellow-Citizens:*

Called upon to undertake the duties of the first executive office of our country, I avail myself of the presence of that portion of my fellow-citizens which is here assembled to express my grateful thanks for the favor with which they have been pleased to look toward me, to declare

a sincere consciousness that the task is above my talents, and that I approach it with those anxious and awful presentments which the greatness of the charge and the weakness of my powers so justly inspire. A rising nation, spread over a wide and fruitful land, traversing all the seas with the rich productions of their industry, engaged in commerce with nations who feel power and forget right, advancing rapidly to destinies beyond the reach of mortal eye—when I contemplate these transcendent objects, and see the honor, the happiness, and the hopes of this beloved country committed to the issue and the auspices of this day, I shrink from the contemplation, and humble myself before the magnitude of the undertaking. Utterly, indeed, should I despair did not the presence of many whom I here see remind me that in the other high authorities provided by our Constitution I shall find resources of wisdom, of virtue, and of zeal on which to rely under all difficulties. To you, then, gentlemen, who are charged with the sovereign functions of legislation, and to those associated with you, I look with encouragement for that guidance and support which may enable us to steer with safety the vessel in which we are all embarked amidst the conflicting elements of a troubled world.

During the contest of opinion through which we have passed the animation of discussions and of exertions has sometimes worn an aspect which might impose on strangers unused to think freely and to speak and to write what they think; but this being now decided by the voice of the nation, announced according to the rules of the Constitution, all will, of course, arrange themselves under the will of the law, and unite in common efforts for the common good. All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression. Let us, then, fellow-citizens, unite with one heart and one mind. Let us restore to social intercourse that harmony and affection without which liberty and even life itself are but dreary things. And let us reflect that, having banished from our land that religious intolerance under which mankind so long bled and suffered, we have yet gained little if we countenance a political intolerance as despotic, as wicked, and capable of as bitter and bloody persecutions. During the throes and convulsions of the ancient world, during the agonizing spasms of infuriated men, seeking through blood and slaughter his long-lost liberty, it was not wonderful that the agitation of the billows should reach even this distant and peaceful shore; that this should be more felt and feared by some and less by others, and should divide opinions as to measures of safety. But every difference of opinion is not a difference of principle. We are all Republicans, we are all Federalists. If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it. I know, indeed, that some honest men fear that republican government can not be strong, that this Government is not strong enough; but would the honest patriot, in the full tide of successful experiment, abandon a government which has so far kept us free and firm on the theoretic and visionary fear that this Government, the world's best hope, may by possibility want energy to preserve itself? I trust not. I believe this,

on the contrary, the strongest Government on earth. I believe it the only one where every man, at the call of the law, would fly to the standard of the law, and would meet invasions of the public order as his own personal concern. Sometimes it is said that man can not be trusted with a government of himself. Can he, then, be trusted with the government of others? Or have we found angels in the forms of kings to govern him? Let history answer this question.

Let us, then, with courage and confidence pursue our own Federal and Republican principles, our attachment to union and representative government. Kindly separated by nature and a wide ocean from the exterminating havoc of one quarter of the globe; too high-minded to endure the degradation of the others; possessing a chosen country, with room enough for our descendants to the thousandth and thousandth generation; entertaining a due sense of our equal right to the use of our own faculties, to the acquisitions of our own industry, to honor and confidence from our fellow-citizens, resulting not from birth, but from our actions and our sense of them; enlightened by a benign religion, professed, indeed, and practiced in various forms, yet all of them inculcating honesty, truth, temperance, gratitude, and love of man; acknowledging and adoring an overruling Providence, which by all its dispensations proves that it delights in the happiness of man and his greater happiness hereafter—with all these blessings, what more is necessary to make us a happy and a prosperous people? Still one thing more, fellow-citizens—a wise and frugal Government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government, and this is necessary to close the circle of our felicities.

About to enter, fellow-citizens, on the exercise of duties which comprehend everything dear and valuable to you, it is proper you should understand what I deem the essential principles of our Government, and consequently those which ought to shape its Administration. I will compress them within the narrowest compass they will bear, stating the general principle, but not all its limitations. Equal and exact justice to all men, of whatever state or persuasion, religious or political; peace, commerce, and honest friendship with all nations, entangling alliances with none; the support of the State Governments in all their rights, as the most competent administrations for our domestic concerns and the surest bulwarks against anti-republican tendencies; the preservation of the General Government in its whole constitutional vigor, as the sheet anchor of our peace at home and safety abroad; a jealous care of the right of election by the people—a mild and safe corrective of abuses which are lopped by the sword of revolution where peaceable remedies are unprovided; absolute acquiescence in the decisions of the majority, the vital principle of republics, from which is no appeal but to force, the vital principle and immediate parent of despotism; a well disciplined militia, our best reliance in peace and for the first moments of war, till regulars may relieve them; the supremacy of the civil over the military authority; economy in the public expense, that labor may be lightly burthened; the honest payment of our debts and sacred preservation of the public faith; encouragement of agriculture, and of commerce as its handmaid; the diffusion of information



and arraignment of all abuses at the bar of the public reason; freedom of religion; freedom of the press, and freedom of person under the protection of the habeas corpus, and trial by juries impartially selected. These principles form the bright constellation which has gone before us and guided our steps through an age of revolution and reformation. The wisdom of our sages and blood of our heroes have been devoted to their attainment. They should be the creed of our political faith, the text of civic instruction, the touchstone by which to try the services of those we trust; and should we wander from them in moments of error or of alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty and safety.

I repair, then, fellow-citizens, to the post you have assigned me. With experience in subordinate offices to have seen the difficulties of this the greatest of all, I have learnt to expect that it will rarely fall to the lot of the imperfect man to retire from this station with the reputation and the favor which bring him into it. Without pretensions to that high confidence you reposed in our first and greatest revolutionary character, whose pre-eminent services had entitled him to the first place in his country's love and destined for him the fairest page in the volume of faithful history, I ask so much confidence only as may give firmness and effect to the legal administration of your affairs. I shall often go wrong through defect of judgment. When right, I shall often be thought wrong by those whose positions will not command a view of the whole ground. I ask your indulgence for my own errors, which will never be intentional, and your support against the errors of others, who may condemn what they would not if seen in all its parts. The approbation implied by your suffrage is a great consolation to me for the past, and my future solicitude will be to retain the good opinion of those who have bestowed it in advance, to conciliate that of others by doing them all the good in my power, and to be instrumental to the happiness and freedom of all.

Relying, then, on the patronage of your good will, I advance with obedience to the work, ready to retire from it whenever you become sensible how much better choice it is in your power to make. And may that Infinite Power which rules the destinies of the universe lead our councils to what is best, and give them a favorable issue for your peace and prosperity.

March 4, 1801.

### **The Monroe Doctrine**

The Monroe Doctrine as first authentically announced must be gathered from the Presidential messages of President Monroe, one delivered December 2, 1823, and the other December 7, 1824.

These messages were to declare the policy of the United States, as to its relation to and connection with all European nations. The grave question was as to whether or not the United States should join or become a part of the Holy Alliance, or whether it should resist the attempts of the alliance or its members of further colonizing America. Great Britain had refused to join the alliance and was determined to resist

the aggressions of the Holy Alliance in Europe, and the United States determined to pursue a similar course as to this hemisphere, and this declaration therefore made England and America allies against the Holy Alliance.

The Declaration of President Monroe of December 2, 1823, which first announced the Monroe Doctrine dealt with territory in the northwestern part of America, which both Russia and England were claiming and which dispute was ultimately settled by treaties; the doctrine was announced that neither Russia nor England should further extend colonization in the northern part of America. The doctrine also dealt with Central and Southern America, as to which France, through the Holy Alliance, was attempting to acquire control over Spain's possessions in America. England of course was jealous of all other European powers and gladly joined with the United States in declaring and upholding the Monroe Doctrine as against the European alliance in all Central and South American countries. England, however, declined to join with America in acknowledging the absolute independence of all Spanish American Republics, England's idea was that these Spanish American Republics should be controlled and ultimately divided between herself and the United States. To this the United States would not agree, and declined to enter into any such agreement with England that bound the United States to take part in any of her wars or troubles or politics with other European powers. England was for the Monroe Doctrine, provided it did not apply to her. To prevent the Holy Alliance from acquiring power or control of American territory she was more than willing, but she was not willing to declare the independence of Spanish American Republics, nor to foreclose herself from control or authority as to Central or South American countries.

The Monroe Doctrine is to America what the Balance of Power Doctrine is to Europe. The difference in the doctrines, however, is very great,—as different as is the republican form of government from monarchical and despotic forms of government, as different as liberty from tyranny.

The Monroe Doctrine "boiled" down is *non-intervention* by America in European affairs; and non-intervention of Europe in American affairs. It declares that the United States will never inter-meddle with European affairs, and that no European government shall ever inter-meddle with American affairs. It is a patriotic declaration of a patriotic principle.

The Balance of Power Doctrine is to divide all great European powers into two great factions or alliances, so that each faction may prevent the other faction from colonizing or controlling the small or unimportant countries, nations or people. Each alliance is, however, always attempting to colonize, possess or control every small nation, country or people, and thus add to its superior power, force and numbers: but at the same time it denies the right of the other alliance or any of its members the same right, and denies the right of any small or unimportant country, nation or people to form an alliance with the opposite alliance.

The object and purpose of the Monroe Doctrine is to preserve peace, and prevent war between European and American countries, and to teach and cherish patriotism among all nations. The object and purpose of the Balance of Power Doctrine is to promote war and to destroy all patriotism among all European nations.

Mr. Jefferson well stated the difference. The Monroe Doctrine, or the American Doctrine, seeks to establish freedom for all America: while the Balance of Power, or the European Doctrine, seeks to prevent freedom, and to establish and to perpetuate despotic governments.

The following excerpts from President Monroe's message to Congress on the second of December 1823, contain the gist of the doctrine, and the conditions that led to the necessity of announcing it. After reciting the facts as to the proposals of the Russian government to the United States and to Great Britain as to the respective interests and rights of the three countries to territory in the northwestern part of America, the president said:

In the discussions to which this interest has given rise, and in the arrangements by which they may terminate, the occasion has been judged proper for asserting, as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintained, are henceforth not to be considered as subjects for future colonization by any European powers.

Further in the message, he refers to conditions in Portugal and Spain, where he says:

The citizens of the United States cherish sentiments the most friendly in favor of the liberty and happiness of their fellow-men on that side of the Atlantic. In the wars of the European powers, in matters relating to themselves we have never taken any part, nor does it comport with our policy so to do. It is only when our rights are in-

vaded or seriously menaced that we resent injuries or make preparation for our defense. With the movements in this hemisphere we are, of necessity, more immediately connected, and by causes which must be obvious to all enlightened and impartial observers. The political system of the Allied Powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective Governments. And to the defence of our own, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted. *We owe it, therefore, to candor, and to the amicable relations existing between the United States and those Powers, to declare that we should consider any attempt on their part to extend their system to any portion of the hemisphere as dangerous to our peace and safety.* With the existing colonies or dependencies of any European power we have not interfered and shall not interfere; but with the Governments who have declared their independence and maintained it, and whose independence we have on great consideration and on just principles acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, *in any other light than as the manifestation of an unfriendly disposition toward the United States.* In the war between those new Governments and Spain we declared our neutrality at the time of their recognition, and to this we have adhered, and shall continue to adhere, provided no change shall occur which, in the judgment of the competent authorities of this Government, shall make a corresponding change on the part of the United States indispensable to their security.

Our policy in regard to Europe, which was adopted at an early stage of the wars which have so long agitated that quarter of the globe, nevertheless remains the same, which is, not to interfere in the internal concerns of any of its Powers; to consider the government *de facto* as the legitimate government for us; to cultivate friendly relations with it, and to preserve those relations by a frank, firm, and manly policy; meeting, in all instances, the just claims of every Power, submitting to injuries from none. But in regard to these continents circumstances are eminently and conspicuously different. It is impossible that the Allied Powers should extend their political system to any portion of either continent without endangering our peace and happiness; nor can anyone believe that our Southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore, that we should behold such interposition, in any form, with indifference. If we look to the comparative strength and resources of Spain and these new Governments, and their distance from each other, it must be obvious that she can never subdue them. It is still the true policy of the United States to leave the parties to themselves, in the hope that other Powers will pursue the same course.

Then again, in a message a year later, December 7, 1824, the President referred to the same conditions and redeclared the policy as follows:

Separated, as we are, from Europe by the great Atlantic Ocean, we can have no concern in the wars of the European Governments, nor in



the causes which produce them. The balance of power between them, into whichever scale it may turn in its various vibrations, cannot affect us. It is the interest of the United States to preserve the most friendly relations with every Power, and on conditions fair, equal, and applicable to all. But in regard to our neighbors our situation is different. It is impossible for the European Governments to interfere in their concerns, especially in those alluded to which are vital, without such interference in the present state of the war between the parties, if a war it may be called, would appear to be equally applicable to us. It is gratifying to know that some of the Powers with whom we enjoy a very friendly intercourse, and to whom these views have been communicated, have appeared to acquiesce in them.

In the opinion of the writer, the Monroe Doctrine was better expressed by Mr. Jefferson, in his letter to President Monroe who had requested his advice on the subject, than was ever done before or since. In other words, the consensus of opinion as to what the Monroe Doctrine was, is expressed best by Mr. Jefferson in this letter, and the president admits that he was following the advice of Jefferson and Madison when he declared the doctrine. The following excerpts from that letter are interesting and instructive :

To the President of the United States  
(James Monroe).

Monticello, October 24, 1823.

Dear Sir:—The question presented by the letters you have sent me, is the most momentous which has ever been offered to my contemplation since that of Independence. That made us a nation, this sets our compass and points the course which we are to steer through the ocean of time opening on us. And never could we embark on it under circumstances more auspicious. Our first and fundamental maxim should be, never to entangle ourselves in the broils of Europe. Our second, never to suffer Europe to intermeddle with cis-Atlantic affairs. America, North and South, has a set of interests distinct from those of Europe, and peculiarly her own. She should therefore have a system of her own, separate and apart from that of Europe. While the last is laboring to become the domicile of despotism, our endeavor should surely be, to make our hemisphere that of freedom. . . . Its object is to introduce and establish the American system, of keeping out of our land all foreign powers, of never permitting those of Europe to intermeddle with the affairs of our nation. It is to maintain our own principles, not to depart from it. And, if, to facilitate this, we can effect a division in the body of the European powers, and draw over to our side its most powerful member, surely we should do it. . . . I have been so long weaned from political subjects, and have so long ceased to take any interest in them, that I am sensible I am not qualified to offer opinions on them worthy of any attention. But the question now proposed involves consequences so lasting, and effects so decisive of our future destinies, as to rekindle all the interest I have heretofore felt on such occasions, and to induce me to the hazard of opinions, which will prove only my wish to contribute still my mite

towards anything which may be useful to our country. And praying you to accept it at only what it is worth, I add the assurance of my constant and affectionate friendship and respect.

This letter was written after Mr. Jefferson was eighty years of age, and within less than three years before his death which occurred July 4, 1826: John Adams died the same day: it being fifty years to a day after the signing of the Declaration of Independence—to which he refers in the above letter. It is worthy to be remembered that Jefferson, Adams, and Franklin constituted the committee which drafted the Declaration of Independence,—nearly all of it, however, was drafted by Mr. Jefferson.

The following excerpts from Mr. Madison's letters to President Monroe are answers to the request of the president that he be advised on the subject by his two predecessors in office, and show that Mr. Madison and Mr. Jefferson advised with each other before advising the president, and that the president put before them the papers and letters relating to the communications which had passed between the ministers of other governments and our own on the subject. Among other things, Mr. Madison said:

To President Monroe.

October 30, 1823.

Dear Sir:—I have just received from Mr. Jefferson your letter to him, with the correspondence between Mr. Canning and Mr. Rush, sent for his and my perusal, and our opinions on the subject of it.

From the disclosure of Mr. Canning it appears, as was otherwise to be inferred, that the success of France against Spain would be followed by an attempt of the Holy allies to reduce the revolutionized colonies of the latter to their former dependence.

The professions we have made to these neighbors, our sympathies with their liberties and independence, the deep interest we have in the most friendly relations with them, and the consequences threatened by a command of their resources by the Great Powers, confederated against the rights and reforms of which we have given so conspicuous and persuasive an example, all unite in calling for our efforts to defeat the meditated crusade. It is particularly fortunate that the policy of Great Britain, though guided by calculations different from ours, has presented a co-operation for an object the same with ours. With that co-operation we have nothing to fear from the rest of Europe, and with it the best assurance of success to our laudable views. There ought not, therefore, to be any backwardness, I think, in meeting her in the way she has proposed; keeping in view, of course, the spirit and forms of the Constitution in every step taken in the road to war, which must be the last step if those short of war should be without avail.

The day after writing the above letter to the president, Mr. Madison wrote Mr. Jefferson as follows:

To Thomas Jefferson,

Montpelier, Nov. 1, 1823.

Dear Sir:—I return the letter of the President. The correspondence from abroad has gone back to him, as you desired. I have expressed to him my concurrence in the policy of meeting the advances of the British Government, having an eye to the forms of our Constitution in every step in the road to war. With the British power and navy combined with our own, we have nothing to fear from the rest of the world; and in the great struggle of the epoch between liberty and despotism, we owe it to ourselves to sustain the former, in this hemisphere at least. I have even suggested an invitation to the British Government to join in applying the "small effort for so much good" to the French invasion of Spain, and to make Greece an object of some such favorable attention. Why Mr. Canning and his colleagues did not sooner interpose against the calamity, which could not have escaped foresight, can not be otherwise explained but by the different aspect of the question when it related to liberty in Spain, and to the extension of British commerce to her former Colonies.

Later he wrote the president relative to the matter as follows:

Montpelier, Dec. 26, 1823.

To President Monroe,

Dear Sir:—Yours of the 20th was duly received. The external affairs of our country are, I perceive, assuming a character more and more delicate and important. The ground on which the Russian communications were met was certainly well chosen. It is evident that an alienation is going on between Great Britain and the ruling powers of the Continent, and that the former is turning her views to such a connection with this side of the Atlantic as may replace her loss of political weight and commercial prospects on the other. This revolution was indicated by the coaxing speech of Mr. Canning at the Liverpool dinner; and is fully displayed by his project for introducing the United States to a Congress on the Continent. Whilst the English Government very naturally endeavors to make us useful to her national objects, it is incumbent on us to turn, as far as we fairly can, the friendly consultations with her to ours; which, besides being national, embrace the good of mankind everywhere. It seems particularly our duty not to let that nation usurp a meritorious lead in measures due to our South American neighbors; one obstacle to which was aptly furnished [by] Mr. Rush in his proposal to Mr. Canning, that their Independence should be forthwith acknowledged. Nor ought we to be less careful in guarding against an appearance in the eyes of Europe, at which the self-love of Great Britain may aim, of our being a satellite of her primary greatness.

This last consideration will, of course, be felt in the management of the invitation which Mr. Canning is inviting for us to the expected Congress. A participation in it would not be likely to make converts to our principles; whilst our admission under the wing of England would take from our consequence what it would add to hers. Such an invitation, nevertheless, will be a mark of respect not without value,

and this will be more enhanced by a polite refusal than by an acceptance; not to mention that the acceptance would be a step leading us into a wilderness of politics and a den of conspirators.

The above shows that the immediate, direct and proximate cause of the declaration of the Monroe Doctrine was to accept the offer of Great Britain made through her minister, Mr. Canning, to our minister at the Court of St. James to join England in preventing France, Prussia or Russia, members of Holy Alliance, from further acquiring or extending their colonial territory or possessions in America. The Holy Alliance was endeavoring to gain possession or control at least of the Spanish possessions in America, and it was also bent on preventing England from acquiring further or extending her possessions in America. England knew that if the American territory held by Spain, and that claimed by Russia in the northwestern part of America was committed to the Alliance, that the balance of power would then be in favor of the Holy Alliance, and this she was determined to prevent. Great Britain and the Holy Alliance were both seeking to make an alliance with the United States. The United States chose to make the agreement with Great Britain, rather than the Holy Alliance, but she declined to be a party to any of their European quarrels, politics or wars, but she did agree with England to preserve the *status quo* of all American territory and to see that Spanish possessions and colonies were not absorbed by France or Prussia, and that Russia did not further extend her possessions to the northwest in America.

England declined to recognize the independence of Spain's possessions as requested by our minister; but England was glad to aid in preventing her European adversaries from acquiring American colonies or possessions, for the reason that such possessions would have threatened and jeopardized her supremacy of commerce. England has always been exceedingly jealous of all nations as to commerce. She has for centuries held the position of primacy as to commerce among all the nations of the world, and this above everything else she has for ages guarded. She at once shows her jealous spirit, the moment any nation, alliance, or league threatens her supremacy as to commerce. She never makes any treaty or enters into any alliance or league which does not secure the continuance of her supremacy of the seas, and she is ever willing to enter into almost any agreement with other nations which tends to per-



petuate this supremacy. It was this principle alone which induced her to propose the relations with the United States, which called forth the Monroe Doctrine.

She has not always observed the doctrine to the same degree or extent which she desired or requested that other European countries should be required to observe it. On several occasions, the United States has had to specifically call her attention to the Doctrine, and to again declare that the Doctrine should be enforced against her as well as all other European nations. These differences, however, as to England's rights and duties as to American territory or governments, under the Monroe Doctrine, were in every instance settled and adjusted peaceably.

While the occasion and the circumstances above referred to evoked the explicit declaration of the Monroe Doctrine, it was then no new doctrine, either in theory or practice. The doctrine was in substance announced in the *Federalist*, both by Hamilton and Madison, and by General Washington in his farewell address, and by Mr. Jefferson in his first inaugural address, and by every president since, down to and including Mr. Wilson.

Compare the following part of Washington's farewell address with the Monroe Doctrine, and there is little difference between the two and to our foreign policies. In that address Washington said:

The great rule of conduct for us in regard to foreign nations, is, in extending our commercial relations, to have with them as little political connection as possible. So far as we have already formed engagements, let them be fulfilled with perfect good faith. Here let us stop.

Europe has a set of primary interests, which to us have none, or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves, by artificial ties, in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or enmities.

Our detached and distant situation invites and enables us to pursue a different course. If we remain one people, under an efficient Government, the period is not far off when we may defy material injury from external annoyance; when we may take such an attitude as will cause the neutrality we may at any time resolve upon, to be scrupulously respected; when belligerent nations, under the impossibility of making acquisitions upon us, will not lightly hazard the giving us provocation; when we may choose the peace or war as our interest, guided by justice, shall counsel.

Why forego the advantages of so peculiar a situation? Why quit our own to stand upon foreign ground? Why, by interweaving our

destiny with that of any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalry, interest, humor, or caprice?

There was a time not many years ago, while Mr. Wilson was president of the United States, and represented that government only, that he believed in and declared the same doctrines as to our relation with foreign nations, which Washington, Jefferson and Monroe believed and declared. In 1914, he said, commending Washington's advice to avoid entangling alliances:

Every man who worthily stands in this presence should examine himself and see whether he has the full conception of what it means that America should live her own life. Washington saw it when he wrote his Farewell Address.

It was not merely because of passing and transient circumstances that Washington said that we must keep free from entangling alliances. It was because he saw that no country had yet set its face in the same direction in which America had set her face.

WE CAN NOT FORM ALLIANCES WITH THOSE WHO ARE NOT GOING OUR WAY: AND IN OUR MIGHT AND MAJESTY AND IN THE CONFIDENCE AND DEFINITENESS OF OUR OWN PURPOSE WE NEED NOT AND WE SHOULD NOT FORM ALLIANCES WITH ANY NATION IN THE WORLD.

Those who are right, those who study their consciences in determining their policies, those who hold their honor higher than their advantage, do not need alliances.

You need alliances when you are not strong, and you are weak only when you are not true to yourself. You are weak only when you are in the wrong; you are weak only when you are afraid to do right; you are weak only when you doubt your cause and the majesty of a nation's might asserted.

It is charged by his political opponents, and believed by some of his political friends, that Mr. Wilson has had a change of head and heart on this subject since he became the champion of the League of Nations, and that he now "hears voices in the air," calling him to represent not the United States or the people thereof, but the world, and everybody everywhere. It is now said by many that he is willing to scrap the Declaration of Independence, the Constitution of the United States, Washington's Farewell Address, Jefferson's First Inaugural Address, the Monroe Doctrine or any other American institution or tradition and accept Lord Cecil's and General Smuts' covenants of the proposed League of Nations in lieu of all of these and as a panacea of all international ills.

Mr. Wilson, however, according to the opinion of many who have studied his books, read his lectures and speeches, never

has fully believed in our American form of government. A division of governmental power between the states and the United States, and then, again, dividing those powers among the legislative, executive and judicial departments of government, has always been considered by Mr. Wilson to have been a grievous error. He believes all governmental power ought to be centered in one man or body of men. He is also a disbeliever in written constitutions. He claims that no nation or people can progress who are bound by the ligaments of a written constitution. He does not believe that the government or its rulers ought to be bound by a written constitution. He is the only president of the United States, who has not professed to believe in our system of government in the respects above mentioned.

### **The Alien and Sedition Laws**

The first great division of opinion and sentiment as to the character, nature and extent of the powers of the Federal Government after the Constitution was ratified, arose over the validity of the Alien and Sedition laws passed by Congress during the elder Adams' administration. Some of the states acting through their legislatures passed resolutions of protest against these acts of Congress, assailing them as being an unwarranted and unauthorized exercise of power by Congress and therefore unconstitutional and void. The leading statesmen and constitutional lawyers of the Republican or anti-Federalist party—chief among whom were Thomas Jefferson and James Madison—believed and declared these acts to be unconstitutional. Virginia and Kentucky both passed resolutions protesting against the acts, and memorializing Congress to repeal the acts, and requesting other states to join them in their protests and memorials on the subject.

The Virginia resolutions, the reports thereof to the legislature, and the address of the legislature to the people after it was passed, were all drafted by James Madison, the father of the Constitution. The Kentucky resolutions, the report thereof, and the address to the people after its adoption, were drafted by Thomas Jefferson, the founder of the Democratic Party in America. Jefferson and Madison conferred with each other often on the subject. The two no doubt suggested this course of procedure by the states, and promoted the cause. These documents, the Virginia and Kentucky resolutions, the reports of the committees accompanying the presentations of

the resolutions and the addresses to the people in support and explanation, formed the most important tenets of the doctrines of the Republican Party, which later became the Democratic Party. Politically speaking, these documents formed the new testament of the Democratic Party.

There can be no doubt that these documents were accepted by the great majority of the American people as the true exposition and construction of our Constitution, and as declaring the true theory of our dual form of government. These resolutions and the reports and addresses accompanying them undoubtedly had much to do with defeating Mr. Adams for reelection and in electing Mr. Jefferson. They sounded the death knell of the Federalist Party, and secured the continued success of the Democratic Party for more than a quarter of a century.

The constitutionality of these acts were never passed upon by the Supreme Court of the United States: they were passed upon, however, by the inferior Federal courts and upheld, and convictions had for violations thereof. Among the first acts of Mr. Jefferson as president was to pardon in full every man who had been convicted under either statute solely on the ground that the statutes were void. The statutes were soon repealed and no cases involving their validity ever reached the Supreme Court.

The Virginia resolutions and excerpts from the reports and addresses accompanying them will be set out herein. The Kentucky resolutions are not set out because they are very similar to the Virginia resolutions. Madison and Jefferson conferred with each other before and while drafting the respective resolutions; and in preparing the addresses, Madison drafting those of Virginia and Jefferson those of Kentucky.

Mr. Calhoun always contended that these resolutions and addresses declared for and justified nullification of the acts of Congress by the states. The word "Nullification" is used in one of the Kentucky resolutions. Mr. Madison and Mr. Jefferson both denied that the resolutions either declared the right of secession or nullification, but merely asserted the right to petition and memorialize, and to thus avoid causes of revolution on the part of the people of the several states. Mr. Jefferson and Mr. Madison, however, found it a difficult task to answer the logic and reasoning of Mr. Calhoun who always claimed that South Carolina's action as to nullification was no more radical than the acts of Virginia and Kentucky in pass-



ing these resolutions, and that the action of all three of the states was proper and justifiable under the Constitution; and his logic was answered and defeated only by force.

### Virginia Resolutions of 1798

IN THE HOUSE OF DELEGATES,

Friday, December 21, 1798.

(1). *Resolved*, That the General Assembly of Virginia doth unequivocally express a firm resolution to maintain and defend the Constitution of the United States, and the Constitution of this State, against every aggression either foreign or domestic; and that they will support the Government of the United States in all measures warranted by the former.

(2). That this Assembly solemnly declares a warm attachment to the Union of the States, to maintain which it pledges all its powers; and that for this end, it is their duty to watch over and oppose every infraction of those principles which constitute the only basis of that Union, because a faithful observance of them can alone secure its existence and the public happiness.

(3). That this Assembly doth explicitly and peremptorily declare that it views the powers of the Federal Government as resulting from the compact to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact; as no further valid than they are authorized by the grants enumerated in that compact; and that, in case of a deliberate, palpable, and dangerous exercise of other powers not granted by the said compact, the States, who are parties thereto, have the right and are in duty bound to interpose for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them.

(4). That the General Assembly doth also express its deep regret, that a spirit has in sundry instances been manifested by the Federal Government to enlarge its powers by forced constructions of the constitutional charter which defines them; and that indications have appeared of a design to expound certain general phrases (which, having been copied from the very limited grant of powers in the former Articles of Confederation, were the less liable to be misconstrued) so as to destroy the meaning and effect of the particular enumeration which necessarily explains and limits the general phrases; and so as to consolidate the States, by degrees, into one sovereignty, the obvious tendency and inevitable result of which would be to transform the present republican system of the United States into an absolute, or, at least, a mixed monarchy.

(5). That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution in the two late cases of the "Alien and Sedition Acts," passed at the last session of Congress; the first of which exercises a power nowhere delegated to the Federal Government, and which, by uniting legislative and judicial powers to those of (the) executive, subvert the general principles of free government, as well as the particular organization and positive provisions of the Federal Constitution; and the other of which acts exercises, in like manner, a power not delegated by the Constitution,

but, on the contrary, expressly and positively forbidden by one of the amendments thereto,—a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.

(6). That this State having by its Convention which ratified the Federal Constitution expressly declared that, among other essential rights, "the liberty of conscience and of the press can not be cancelled, abridged, restrained or modified by any authority of the United States," and from its extreme anxiety to guard these rights from every possible attack of sophistry or ambition, having, with other States, recommended an amendment for that purpose, which amendment was in due time annexed to the Constitution,—it would mark a reproachful inconsistency and criminal degeneracy, if an indifference were now shown to the palpable violation of one of the rights thus declared and secured, and to the establishment of a precedent which may be fatal to the other.

(7). That the good people of this Commonwealth, having ever felt and continuing to feel the most sincere affection for their brethren of the other States, the truest anxiety for establishing and perpetuating the union of all and the most scrupulous fidelity to that Constitution, which is the pledge of mutual friendship, and the instrument of mutual happiness, the General Assembly doth solemnly appeal to the like dispositions of the other States, in confidence that they will concur with this Commonwealth in declaring, as it does hereby declare, that the acts aforesaid are unconstitutional; and that the necessary and proper measures will be taken by each for co-operating with this State, in maintaining unimpaired the authorities, rights, and liberties reserved to the States respectively, or to the people.

(8). That the Governor be desired to transmit a copy of the foregoing resolutions to the Executive authority of each of the other States, with a request that the same may be communicated to the Legislature thereof; and that a copy be furnished to each of the Senators and Representatives representing this State in the Congress of the United States.

Attest: JOHN STEWART.

1798, December 24. Agreed to by the Senate.

H. BROOKE.

A true copy from the original deposited in the office of the General Assembly.

JOHN STEWART, Keeper of Rolls.

## Virginia Resolutions of 1799

IN THE HOUSE OF DELEGATES,

Friday, January 4, 1799.

*Resolved*, That the General Assembly of Virginia will co-operate with the authorities of the United States in maintaining the independence, Union, and Constitution thereof, against the hostilities or intrigues of all foreign Powers whatsoever; and that although differences of opinion do exist in relation to internal and domestic measures, yet a charge that there is a party in this Commonwealth under the influences of any foreign power is unfounded and calumnious.

*Resolved*, That the General Assembly do, and will always, behold with indignation, depredations on our commerce, insults on our citizens, impressments of our seamen, or any other injuries committed on the people or Government of the United States by foreign nations.

*Resolved*, Nevertheless, that our security from invasion and the force of our militia render a standing army unnecessary; that the policy of the United States forbids a war of aggression; that our whole reliance ought to be on ourselves; and, therefore, that while we will repel invasion at every hazard, we shall deplore and deprecate the evils of war for any other cause.

*Resolved*, That a copy of the foregoing resolutions be sent to each of the Senators and Representatives of this State in Congress.

Attest: JOHN STEWART, C. H. D.

1799, January 10th. Agreed to by the Senate.

H. BROOKE, C. S.

A true copy from the original deposited in the office of the General Assembly.

JOHN STEWART, Keeper of Rolls.

### Excerpts from the Report on the Virginia Resolutions

In all the contemporary discussions and comments which the Constitution underwent, it was constantly justified and recommended on the ground that the powers not given to the Government were withheld from it; and that if any doubt could have existed on this subject, under the original text of the Constitution, it is removed, as far as words could remove it, by the amendment, now a part of the Constitution, which expressly declares "that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. . . ."

The Constitution of the United States was formed by the sanction of the States, given by each in its sovereign capacity. It adds to the stability and dignity, as well as to the authority of the Constitution, that it rests on this legitimate and solid foundation. The States, then, being the parties to the constitutional compact, and in their sovereign capacity, 'it follows of necessity that there can be no tribunal above their authority to decide, in the last resort, whether the compact made by them be violated; and, consequently, that, as the parties to it, they must themselves decide, in the last resort, such questions as may be of sufficient magnitude to require their interposition. . . ."

It does not allow, however, because the States, as sovereign parties to their constitutional compact, must ultimately decide whether it has been violated, that such a decision ought to be interposed either in a hasty manner or on doubtful and inferior occasions. Even in the case of ordinary conventions between different nations, where, by the strict rule of interpretation, a breach of a part may be deemed a breach of the whole—every part being deemed a condition of every other part, and of the whole—it is always laid down that the breach must be both wilful and material, to justify an application of the rule. But in the case of an intimate and constitutional union, like that of the United States, it is evident that the interposition of the parties, in their sovereign capacity, can be called for by occasions only deeply essentially affecting the vital principles of their political system. . . ."

decide in the last resort, this resort must necessarily be deemed the in all questions submitted to it by the forms of the Constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the Government; not in relation to the rights of the parties to the constitutional compact, from which the judicial as well as the other departments hold their delegated trusts. On any other hypothesis, the delegation of judicial power would annul the authority delegating it; and the concurrence of this department with the others in usurped powers might subvert forever, and beyond the possible reach of any rightful remedy, the very Constitution which all were instituted to preserve.

Of the "Alien Act," it is affirmed by the resolution—1st. That it exercises a power nowhere delegated to the Federal Government. 2d. That it unites legislative and judicial powers to those of the Executive. 3d. That this union of power subverts the general principles of free government. 4th. That it subverts the particular organization and positive provisions of the Federal Constitution.

One argument offered in justification of this power exercised over our aliens is, that the admission of them into the country being of favor, not of right, the favor is at all times revocable.

To this argument it might be answered, that, allowing the truth of the inference, it would be no proof of what is required. A question would still occur, whether the Constitution had vested the discretionary power of admitting aliens in the Federal Government or in the State governments.

But it can not be a true inference, that, because the admission of an alien is a favor, the favor may be revoked at pleasure. A grant of land to an individual may be of favor, not of right; but the moment the grant is made, the favor becomes a right, and must be forfeited before it can be taken away. To pardon a malefactor may be a favor, but the pardon is not, on that account, the less irrevocable. To admit an alien to naturalization, is as much a favor as to admit him to reside in the country; yet it can not be pretended that a person naturalized can be deprived of the benefits any more than a native citizen can be disfranchised.

Again, it is said, that aliens not being parties to the Constitution, the rights and privileges which it secures can not be at all claimed by them.

To this reasoning, also, it might be answered that, although aliens are not parties to the Constitution, it does not follow that the Constitution has vested in Congress an absolute power over them. The parties to the Constitution may have granted, or retained, or modified, the power over aliens, without regard to that particular consideration.

But a more direct reply is, that it does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.

If aliens had no rights under the Constitution, they might not only be banished, but even capitally punished, without a jury or the other



incidents to a fair trial. But so far has a contrary principle been carried, in every respect of the United States, that, except on charges of treason, an alien has, besides all the common privileges, the special one of being tried by a jury, of which one-half may be also aliens.

It is said further, that, by the law and practice of nations, aliens may be removed, at discretion, for offences against the law of nations; that Congress is authorized to define and punish such offenses; and that to be dangerous to the peace of society is, in aliens, one of these offenses.

The distinction between alien enemies and alien friends is a clear and conclusive answer to this argument. Alien enemies are under the law of nations, liable to be punished for offenses against it. Alien friends, except in the single case of public ministers, are under the municipal law, and must be tried and punished according to that law only. . . .

It is said that the right of removing aliens is an incident to the power of war vested in Congress by the Constitution.

This is a former argument in a new shape only, and is answered by repeating, that the removal of alien enemies is an incident to the power of war; that the removal of alien friends is not an incident to the power of war.

It is said that Congress is, by the Constitution, to protect each State against invasion; and that the means of *preventing* invasion are included in the power of protection against it.

The power of war, in general having been before granted by the Constitution, this clause must either be a mere specification for greater caution and certainty, of which there are other examples in the instrument, or be the injunction of a duty superadded to a grant of the power. Under either explanation it can not enlarge the powers of Congress on the subject. The power and the duty to protect each State against an invading enemy would be the same under the general power, if this regard to greater caution had been omitted.

Invasion is an operation of war. To protect against invasion is an exercise of the power of war. A power, therefore, not incident to war can not be incident to a particular modification of war. And as the removal of alien friends has appeared to be no incident to a general state of war, it can not be incident to a partial state or a particular modification of war.

Nor can it ever be granted that a power to act on a case when it actually occurs, includes a power over all the means that may *tend to prevent* the occurrence of the case. Such a latitude of construction would render unavailing every practical definition of particular and limited powers. . . .

There are powers exercised by most other Governments, which, in the United States, are withheld by the people, both from the General Government and from the State governments. Of this sort are many of the powers prohibited by the Declaration of Rights prefixed to the constitutions, or by the clauses in the constitutions in the nature of such declarations. Nay, so far is the political system of the United States distinguishable from that of other countries, by the caution with which powers are delegated and defined, that in one very important

case, even of commercial regulation and revenue, the power is absolutely locked up against the hands of both Governments. A tax on exports can be laid by no constitutional authority whatever. . . .

In the state prior to the Revolution, it is certain that the common law, under different limitations, made a part of the colonial codes. But whether it be understood that the original colonists brought the law with them, or made it their law by adoption, it is equally certain that it was the separate law of each colony within its respective limits, and was unknown to them as a law pervading and operating through the whole as one society.

It could not possibly be otherwise. The common law was not the same in say two of the Colonies; in some the modifications were materially and extensively different. There was no common legislature by which a common will could be expressed in the form of a law; nor any common magistracy by which such a law could be carried into practice. The will of each colony, alone and separately, had its organs for these purposes. . . .

The fundamental principle of the Revolution was, that the Colonies were co-ordinante members with each other and with Great Britain, of an empire united by a common executive sovereign, but not united by any common legislative sovereign. The legislative power was maintained to be as complete in each American Parliament, as in the British Parliament. And the royal prerogative was in force in each Colony by virtue of its acknowledging the King for its executive magistrate, as it was in Great Britain by virtue of a like acknowledgment there. A denial of these principles by Great Britain, and the assertion of them by America, produced the Revolution. . . .

The Articles of Confederation are the next source of information on this subject.

In the interval between the commencement of the Revolution and the final ratification of these Articles, the nature and extent of the Union was determined by the circumstances of the crisis, rather than by any accurate delineation of the general authority. It will not be alleged that the "common law" could have had any legitimate birth as a law of the United States during that state of things. If it came as such into existence at all, the Charter of Confederation must have been its parent. . . .

It is readily admitted that particular parts of the common law may have a sanction from the Constitution, so far as they are necessarily comprehended in the technical phrases which express the powers delegated to the Government; and so far also as such other parts may be adopted by Congress as necessary and proper for carrying into execution the powers expressly delegated. But the question does not relate to either of these portions of the common law. It relates to the common law beyond these limitations.

The only part of the Constitution which seems to have been relied on in this case is the 2d section of Article III: "The judicial power shall extend to all cases *in law and equity* arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority." . . .

The expression "cases in law and equity" is manifestly confined to

cases of a civil nature, and would exclude cases of criminal jurisdiction. Criminal cases in law and equity would be a language unknown to the law.

The succeeding paragraph of the same section is in harmony with this construction. It is in these words: "In all cases affecting ambassadors, or other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. *In all* the other cases (including cases of law and equity arising under the Constitution) the Supreme Court shall have *appellate* jurisdiction both as to law and *fact*; with such exceptions and under such regulations as Congress shall make."

This paragraph, by expressly giving an *appellate* jurisdiction in cases of law and equity arising under the Constitution, to *fact* as well as to law, clearly excludes criminal cases where the trial by jury is secured, because the fact in such cases is not a subject of appeal. And, although the appeal is liable to such *exceptions* and regulations as Congress may adopt, yet it is not to be supposed that an *exception* of *all* criminal cases could be contemplated, as well because a discretion in Congress to make or omit the exception would be improper, as because it would have been unnecessary. . . .

There are two passages in the Constitution in which a description of the law of the United States is found. The first in Article III, Section 2, in the words following: "This Constitution, the laws of the United States, and treaties made or which shall be made under their authority." The second is contained in the second paragraph of Article VI, as follows: "This Constitution and the laws of the United States which shall be made, under the authority of the United States, shall be the supreme law of the land." The first of them consist of an enumeration which was evidently meant to be precise and complete. If the common law had been understood to be a law of the United States, it is not possible to assign a satisfactory reason why it was not expressed in the enumeration. . . .

From the review thus taken of the situation of the American Colonies prior to their independence; of the effect of this event on their situation; of the nature and import of the Articles of Federation; of the true meaning of the passage in the existing Constitution from which the common law has been deduced; of the difficulties and uncertainties incident to the doctrine; and of its vast consequences in extending the powers of the Federal Government, and in superseding the authorities of the State governments—the committee feel the utmost confidence in concluding that the common law never was, nor by any fair construction can be, deemed a law for the American people as one community; and they indulge the strongest expectation that the same conclusion will finally be drawn by all candid and accurate inquiries into the subject. . . .

The plain import of this clause is, that Congress shall have all the incidental or instrumental powers necessary and proper for carrying into execution all the express powers, whether they be vested in the Government of the United States, more collectively, or in the several departments or officers thereof.

It is not a grant of new powers to Congress, but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those otherwise granted are included in the grant.

Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be, whether it is properly an incident to an express power, and necessary to its execution. If it be, it may be exercised by Congress. If it be not, Congress can not exercise it. . . .

In the British Government the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate. The representatives of the people in the Legislature are not only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the Executive. Hence it is a principle, that the Parliament is unlimited in its power; or, in its own language, is omnipotent. Hence, too, all the ramparts for protecting the rights of the people—such as their Magna Charta, their Bill of Rights, &c.—are not reared against the Parliament, but against the royal prerogative. They are merely legislative precautions against executive usurpations. Under such a government as this, an exemption of the press from previous restraint, by licensers appointed by the King, is all the freedom that can be secured to it.

In the United States the case is altogether different. The People, not the Government, possess the absolute sovereignty. The Legislature, no less than the Executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licensers, but from the subsequent penalty of law. . . .

When the Constitution was under the discussions which preceded its ratification, it is well known that great apprehensions were expressed by many, lest the omission of some positive exception, from the powers delegated, of certain rights, and of the freedom of the press particularly, might expose them to the danger of being drawn, by construction, within some of the powers vested in Congress, more especially of the power to make all laws necessary and proper for carrying their other powers into execution. In reply to this objection, it was invariably urged to be a fundamental and characteristic principle of the Constitution, that all powers not given by it were reserved; that no powers were given beyond those enumerated in the Constitution, and such as were fairly incident to them; that the power over the rights in question, and particularly over the press, was neither among the unenumerated powers, nor incident to any of them; and consequently that an exercise of any such power would be manifest usurpation. It is painful to remark how much the arguments now employed in behalf of the Sedition Act are at variance with the reasoning which then justified the Constitution, and invited its ratification. . . .



The proposition of amendments made by Congress is introduced in the following terms:

"The Conventions of a number of the States having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstructions or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the Government will best insure the beneficent ends of its institutions."

Here is the most satisfactory and authentic proof that the several amendments proposed were to be considered as either declaratory or restrictive, and, whether the one or the other, as corresponding with the desire expressed by a number of the States, and as extending the ground of public confidence in the Government. . . .

"We, the delegates of the people of Virginia, duly elected in pursuance of a recommendation from the General Assembly, and now met in Convention, having fully and freely investigated and discussed the proceedings of the Federal Convention, and being prepared, as well as the most mature deliberation hath enabled us, to decide thereon—DO, in the name and in behalf of the people of Virginia, declare and make known, that the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them whenever the same shall be perverted to their injury or oppression; and that every power not granted thereby remains with them, at their will. That, therefore, no right of any denomination can be cancelled, abridged, restricted, or modified by the Congress, by the Senate or House of Representatives, acting in any capacity, by the President, or any department or officer of the United States, except in those instances in which power is given by the Constitution for those purposes; and that, among other essential rights, the liberty of conscience and of the press can not be cancelled, abridged, restrained, or modified, by any authority of the United States."

Here is an express and solemn declaration by the Convention of the State, that they ratified the Constitution in the sense that no right of any denomination can be cancelled, abridged, restrained, or modified, by the Government of the United States, or any part of it, except in those instances in which power is given by the Constitution; and in the sense; particularly, "that among other essential rights, the liberty of conscience and freedom of the press can not be cancelled, abridged, restrained, or modified, by any authority of the United States."

Words could not well express in a fuller or more forcible manner the understanding of the Convention, that the liberty of conscience and the freedom of the press were *equally* and *completely* exempted from all authority whatever of the United States.

Under an anxiety to guard more effectually these rights against every possible danger, the Convention, after ratifying the Constitution, proceeded to prefix to certain amendments proposed by them a declaration of rights, in which are two articles providing, the one for the liberty of conscience, the other the freedom of speech and of the press. . . .

First, Both of these rights, the liberty of conscience and of the press, rest equally on the original ground of not being delegated by the Constitution, and, consequently, withheld from the Government. Any construction, therefore, that would attack this original security for the one must have the like effect on the other.

Secondly. They are both equally secured by the supplement to the Constitution, being both included in the same amendment, made at the same time, and by the same authority. Any construction or argument, then, which would turn the amendment into a grant or acknowledgment of power with respect to the press, might be equally applied to the freedom of religion.

Thirdly. If it be admitted that the extent of the freedom of the press secured by the amendment is to be measured by the common law of this subject, the same authority may be resorted to for the standard which is to fix the extent of the "free exercise of religion." It can not be necessary to say what this standard would be; whether the common law be taken solely as the unwritten, or as varied by the written law of England.

Fourthly. If the words and phrases in the amendment are to be considered as chosen with a studied discrimination, which yields an argument for a power over the press under the limitation that its freedom be not abridged, the same argument results from the same consideration for a power over the exercise of religion, under the limitation that its freedom be not prohibited.

For if Congress may regulate the freedom of the press, provided they do not abridge it, because it is said only "they shall not abridge it," and is not said "they shall make no law respecting it," the analogy of reasoning is conclusive that Congress may *regulate* and even *abridge* the free exercise of religion, provided they do not *prohibit* it; because it is said only "they shall not prohibit it," and is *not* said "they shall make no law *respecting*, or no law *abridging* it." . . .

The Legislatures of the States have a right also to originate amendments to the Constitution, by a concurrence of two-thirds of the whole number, in applications to Congress for the purpose. When new States are to be formed by a junction of two or more States, or parts of States, the Legislatures of the States concerned are, as well as Congress, to concur in the measure. The States have a right also to enter into agreements or compacts, with the consent of Congress. In all such cases a communication among them results from the object which is common to them. . . .

It can not be forgotten, that among the arguments addressed to those who apprehend danger to liberty from the establishment of the General Government over so great a country, the appeal was emphatically made to the intermediate existence of the State Governments, between the people and that Government; to the vigilance with which they would descry the first symptoms of usurpation; and to the promptitude with which they would sound the alarm to the public. This argument was probably not without its effect; and if it was a proper one then to recommend the establishment of the Constitution, it must be a proper one now to assist in its interpretation.

Excerpts from the Address of the General Assembly to the  
People of the Commonwealth of Virginia Relative to  
Virginia Resolutions of 1798

It would be perfidious in those entrusted with the guardianship of the State sovereignty, and acting under the solemn obligation of the following oath, "I do swear that I will support the Constitution of the United States," not to warn you of encroachments, which, though clothed with the pretext of necessity, or disguised by arguments of expediency, may yet establish precedents which may ultimately devote a generous and unsuspecting people to all the consequences of usurped power.

Encroachments springing from a government whose organization can not be maintained without the co-operation of the States, furnish the strongest inducements upon the State Legislatures to watchfulness, and impose upon them the strongest obligation to preserve unimpaired the line of partition.

The acquiescence of the States under infractions of the Federal compact, would either beget a speedy consolidation, by precipitating the State Governments into impotency and contempt; or prepare the way for a revolution, by a repetition of these infractions, until the people are roused to appear in the majesty of their strength. It is to avoid these calamities that the exhibit to the people the momentous question, whether the Constitution of the United States shall yield to a construction which defies every restraint and overwhelms the best hopes of republicanism.

Exhortations to disregard domestic usurpation, until foreign danger shall have passed, is an artifice which may be forever used; because the possessors of power, who are the advocates for its extension, can ever create national embarrassments, to be successively employed to soothe the people into sleep, whilst that power is swelling, silently, secretly, and fatally. Of the same character are insinuations of a foreign influence, which seize upon a laudable enthusiasm against danger from abroad, and distort it by an unnatural application, so as to blind your eyes against danger at home. . . .

The sedition act is the offspring of these tremendous pretensions, which inflict a death-wound on the sovereignty of the States.

For the honor of American understanding, we will not believe that the people have been allured into the adoption of the Constitution by an affection of defining powers, whilst the *preamble* would admit a construction which would erect the will of Congress into a power paramount in all cases, and therefore limited in none. On the contrary, it is evident that the objects for which the Constitution was formed were deemed attainable only by a particular enumeration and specification of each power granted to the Federal Government; reserving all others to the people, or to the States. And yet it is in vain we search for any specified power embracing the right of legislation against the freedom of the press.

Had the States been despoiled of their sovereignty by the generality of the preamble, and had the Federal Government been endowed with whatever they should judge to be instrumental towards union, justice,

tranquillity, common defence, general welfare, and the preservation of liberty, nothing could have been more frivolous than an enumeration of powers.

It is vicious in the extreme to calumniate meritorious public servants; but it is both artful and vicious to arouse the public indignation against calumny in order to conceal usurpation. Calumny is forbidden by the laws, usurpation by the Constitution. Calumny injures individuals, usurpation, States. Calumny may be redressed by the common judicatures; usurpation can only be controlled by the act of society. . . .

The sophistry of a distinction between the liberty and the licentiousness of the press is so forcibly exposed in a late memorial from our late envoys to the Minister of the French Republic, that we here present it to you in their own words:

"The genius of the Constitution, and the opinion of the people of the United States, can not be overruled by those who administer the Government. Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this liberty is often carried to excess; that it has sometimes degenerated into *licentiousness*, is seen and lamented, *but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which can not be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America.* No regulations exist which enable the Government to suppress whatever calumnies or investives any individual may choose to offer to the public eye, or to punish such calumnies and investives otherwise than by a legal prosecution in courts which are alike open to all who consider themselves as injured." . . .

Measures have already been adopted which may lead to these consequences. They consist—

In fiscal systems and arrangements, which keep a host of commercial and wealthy individuals embodied, and obedient to the mandates of the treasury.

In armies and navies, which will, on the one hand, enlist the tendency of man to pay homage to his fellow-creature who can feed or honor him; and on the other, employ the principle of fear, by punishing imaginary insurrections, under the pretext of preventive justice.

In extensive establishment of a volunteer militia, rallied together by a political creed, armed and officered by executive power, so as to deprive the States of their constitutional right to appoint militia officers, and to place the great bulk of the people in a defenceless situation.

In swarms of officers, civil and military, who can inculcate political tenets tending to consolidation and monarchy both by indulgences and severities; and can act as spies over the free exercise of human reason. . . .

Pledged as we are, fellow-citizens, to these sacred engagements, we yet humbly and fervently implore the Almighty Disposer of events to



avert from our land war and usurpation, the scourges of mankind; to permit our fields to be cultivated in peace; to instil into nations the love of friendly intercourse; to suffer our youth to be educated in virtue, and to preserve our morality from the pollution invariably incident to habits of war; to prevent the laborer and husbandman from being harassed by taxes and imposts; to remove from ambition the means of disturbing the commonwealth; to annihilate all pretexts for power afforded by war; to maintain the Constitution; and to bless our nation with tranquillity, under whose benign influence we may reach the summit of happiness and glory, to which we are destined by *nature* and *nature's God*.

Attest: JOHN STEWART, C. H. D.

1799, January 23rd. Agreed to by the Senate.

H. BROOKE, C. S.

A true copy from the original deposited in the office of the General Assembly.  
JOHN STEWART, Keeper of Rolls.

### **The Embargo Acts**

These Alien and Sedition acts passed by Congress during the presidential term of the elder Adams were so unpopular and tended so strongly toward monarchical and military government, that they defeated Mr. Adams for re-election, and elected Mr. Jefferson who drafted the Kentucky resolutions and who conferred with Mr. Madison, who drafted the Virginia resolutions. Mr. Jefferson also selected Mr. Madison as his secretary of state, and who was later chosen as his successor as president.

During the second term of the administration of Mr. Jefferson, in 1807, nearly all Europe was engaged in war, and the seas swarmed with pirates and all international commerce was rendered very hazardous—not only on account of pirates, but European nations at war were seizing and confiscating not only the ships of their enemies, but those of all neutral countries as well. These European warring nations, especially England, were impressing our seamen: England even impressed two nephews of General Washington. This condition was giving a constant source of war, and thus threatened to put the United States into war with one or more of the European nations. Conditions were such that the United States could not carry on international commerce, and remain neutral. No matter how discreet the commerce was conducted, one or another of the warring nations would take offense and involve it in the war. As the only means to avoid war, Mr. Jefferson, and Mr. Madison—his secretary of state—and Congress agreed that all commerce with all foreign or European nations, especially those

at war, should be stopped and it was accomplished, or prohibited, by the passage of the Universal Embargo Acts which prohibited all such international commerce during the European wars; and the United States thus kept from being involved or drawn into the European wars. These acts were, however, repealed as soon as the causes of war were removed.

Similar acts were again passed during Mr. Madison's term of office, but war nevertheless resulted then because our territory was then invaded by foreign forces, and they had to be repelled, or we had to lose our independence, territory and probably government as well.

These Embargo Acts proved very unpopular in the New England states, which were largely engaged in commerce. So unpopular were they that some of the eastern states resolved against them as Virginia and Kentucky had done against the Alien and Sedition laws. The legislatures of these states declared the acts to be void and unconstitutional, and in effect nullified them in so far as the states could do so. The state courts declined to enforce the statutes, and even juries in the Federal courts in these states declined to convict as for violations of these statutes. On this account, there were large elements and forces in these states opposed to the wars, even when our territory was invaded. There was a strong opposition in Congress during Mr. Madison's administration to declaring or carrying on the wars: every act of the administration was opposed by this element in Congress and it came near resulting in the defeat of our armies. The famous Hartford Convention was composed of this element in the Eastern and Northern States, that was opposed to the Embargo Acts, the war, and the administration of Madison. Fortunately, however, the surrender of the British forces occurred while this Convention was in session, and peace followed, before the Convention adjourned and before it could take action. Had the war held out three months longer, until the opposition was thus organized as the Convention proposed, the result might have, and probably would have been very different, and we would have lost the independence we gained by the Revolution.

The success of our armies, the declaration of peace, so enthused the people that they seemed for the time to forget that there was an opposition party, and public opinion severely condemned the action of those who opposed Mr. Madison, the war, or the Embargo Acts. So severe and pronounced was public

opinion against those who participated in or sympathized with this Convention that it resulted in the political death of every one of the participants and of the Federalist party.

### Public Opinion

Mr. Madison has set forth the effect of public opinion on governments, with his usual lucidity of expression:

Public opinion sets bounds to every government, and is the real sovereign in every free one.

As there are cases where the public opinion must be obeyed by the Government; so there are cases where, not being fixed, it may be influenced by the Government. This distinction, if kept in view, would prevent or decide many debates on the respect due from the Government to the sentiments of the people.

In proportion as Government is influenced by opinion, it must be so by whatever influences opinion. This decides the question concerning a *Constitutional Declaration of Rights*, which required an influence on Government, by becoming a part of the public opinion.

The larger a country the less easy for its real opinion to be ascertained, and the less difficult to be counterfeited; when ascertained or presumed, the more respectable it is in the eyes of individuals. This is favorable to the authority of Government. For the same reason, the more extensive a country the more insignificant is each individual in his own eyes. This may be unfavorable to liberty.

Whatever facilitates a general intercourse of sentiments, as good roads, domestic commerce, a free press, and particularly a *circulation of newspapers through the entire body of the people; and Representatives going from and returning among, every part of them*, is equivalent to a contraction of territorial limits, and is favorable to liberty, where these may be too expensive. *4 Writings of Madison, p. 460.*

No greater truth was ever uttered than the above that public opinion is the real sovereign in every free government. Public opinion abolished slavery in spite of written provisions in the Federal Constitution, that the Federal Government could not interfere with the institutions in the several States and in spite of the decision of the Supreme Court in the Dred Scott case, and in spite of Lincoln's first inaugural address, when he said, "I have neither the power nor the desire to abolish slavery."

It made the great Lincoln recant and made him declare war against the seceding States and issue a proclamation abolishing slavery, within a few months after he had said he had neither the power nor the desire to free the slaves in the Southern States.

It made President Wilson declare war when personally he desired to be neutral. It made him declare then there can be no peace without victory, after he had theretofore declared there must be peace without victory.

It made Congress, in the re-construction period, pass bill after bill, which were in palpable violation of the Constitution, and which had to be enforced by military authority in time of peace, because unconstitutional. It made the same Congress attempt to impeach the President of the United States because he would not attempt to enforce the unconstitutional statutes, and because he exercised his constitutional right as President in vetoing such bills as he deemed unconstitutional and in removing from office and places in his Cabinet men whom he deemed unfit to discharge the duties thereof, and who had declined his requests to resign.

It made Madison approve bills for internal improvements when he believed that Congress had no such power. It made Jefferson acquire Louisiana by purchase when he believed that the Constitution conferred no such power. It has made Congress propose several amendments to the Constitution when the majority of Congress did not believe in or favor the proposed amendments. It has made every State Legislature vote for and pass bills which more than one-half of the members did not favor.

Public opinion, when once formed and well crystallized, rules with an iron hand in all free governments, no matter what may be the constitutional provisions. It will rule by peace if it can, but by force if it must. Public opinion in America was in favor of abolishing slavery and of preserving the Union; as it could not do both peaceably, it decided to do the first by force, and in spite of the Constitutional provisions protecting the right of slavery in the Southern States and without Constitutional authority to coerce the Southern States. The fact that the Southern States were claiming only their Constitutional rights made no difference. This did not satisfy public opinion.

### **Political Parties in the United States**

Mr. Bryce thus speaks on the subject :

In America, the great moving forces are the parties. The Government counts for less than in Europe, the parties count for more; and the fewer have become their principles and the fainter their interest in those principles, the more perfect has become their organization. The less of nature the more of art; the less spontaneity the more mechanism. *Bryce's American Commonwealth, Vol. I, 638.*

This is well put by Mr. Bryce, who is certainly as familiar with the principles of European governments and parties as



any other European, and more familiar with American governmental parties than any other man who is not an American, and more so than many Americans, who have presumed to write on the subject, including the writer of this and the compiler of this book. It is too true that with us, the government is forgotten in the race between the parties for control of it. Party spirit sometimes becomes so strong that the people seem willing to wreck the government if necessary to save the party in power, or to put a new one in.

This was true in 1860. No matter which party had won, the other would have withdrawn from the Union.

The Union, Lincoln said, could no longer exist one-half free and one-half slave. It did so exist for a long time, nearly a century, but it was because it was so equally divided on the subject. It could not exist if a decided majority of the States was *pro* or *anti* slavery. For years and years, the balance of power was preserved by admitting two states at a time into the Union, one slave and one non-slave.

Mr. Bryce has further illustrated the relation of American parties to American governments :

When the machinery had been set in motion by the choice of George Washington as president, and with him of a Senate and a House of Representatives, the tendencies which had opposed or supported the adoption of the Constitution, reappeared not only in Congress but in the President's cabinet, where Alexander Hamilton, secretary of the treasury, counselled a line of action which assumed and required the exercise of large powers by the Federal Government, while Jefferson, the secretary of State, desired to practically restrict its action to foreign affairs. The advocates of a central national authority had begun to receive the name of Federalists, and to act pretty constantly together, when an event happened which, while it tightened their union, finally consolidated their opponents also into a party. This was the creation of the French Republic and its declaration of war against England. *Bryce's American Commonwealth, Vol. I, 639.*

While the piercing intellect of Hamilton developed all those of its provisions which invested the Federal Congress and President with far-reaching powers, and sought to build up a system of institutions which showed to these provisions their full effect, Jefferson<sup>1</sup> and his

<sup>1</sup>Mr Jefferson not only responded to the then public opinion in America but he was in accord with it. He voiced it and formulated it in the Declaration of Independence, in the laws of Virginia, and in the first ten amendments to the Constitution. Hamilton and Adams responded to and were in accord with the public opinion of England, but not of America. They accepted the Constitution and government created by it because they knew it was as strong and as near like the

British government as it was then possible to obtain. The same may be said of Mr. Jefferson and his followers: they accepted the Constitution and government because they believed it was as near their wishes as they could then obtain. Each party believed it would in the future be changed to meet their views. For the first 75 years, it was changed to meet the views of Jefferson, for the last 75 years it has been changed to meet the views of Hamilton and Adams.

coadjutors appealed to the sentiment of individualism, strong in the masses of the people, and, without venturing to propose alterations in the text of the Constitution, protested against all extensions of its letter, and against all the assumptions of Federal authority which such extensions could be made to justify. Thus two parties grew up with tenets, leaders, impulses, sympathies, hatreds, hatreds which soon became so bitter as not to spare the noble and dignified figure of Washington himself, whom the angry Republicans assailed with invectives the more unbecoming because his official position forbade him to reply.

At first the Federalists had the best of it, for the reaction against the weakness of the old Confederation which the Union had superseded disposed sensible men to tolerate a strong central power. The President, though not a member of either party, was, by force of circumstances, as well as owing to the influences of Hamilton, practically with the Federalists. But during the presidency of John Adams, who succeeded Washington, they committed grave errors. When the presidential election of 1800 arrived, it was seen that the logical and oratorical force of Hamilton's appeals to the reason of the nation told far less than the skill and energy with which Jefferson played on their feelings and prejudices. *Bryce's American Commonwealth, Vol. I, 640.*

Jefferson's popularity lies in the fact that he became the representative not merely of democracy, but of local democracy, of the notion that government is hardly wanted at all, that the people are sure to go right if they are left alone, that he who resists authority is *prima facie*, justified in doing so, because authority is *prima facie* tyrannical, that a country where each local body in its own local area looks after the objects of common concern, raising and administering any such funds as are needed, and is interfered with as little as possible by any external power, comes nearest to the ideal of a truly free people. Some intervention on the part of the State there must be, for the State makes the law and appoints the judges of appeal; but the less one has to do with the State, and a *fortiori* the less one has to do with the less popular and more encroaching Federal authority, so much the better. Jefferson impressed this view on his countrymen with so much force and such personal faith that he became a sort of patron saint of freedom in the eyes of the next generation, who used to name their children after him, and to give dinners and deliver high-flown speeches on his birthday, a festival only second in importance to the immortal Fourth of July. He had borrowed from the Revolutionists of France even their theatrical ostentation of simplicity. He rejected the ceremonial with which Washington had sustained the chief magistracy of the nation, declaring that to him there was no majesty but that of the people. *Bryce's American Commonwealth, Vol. I, 642.*

It is related of a New England clergyman that when, being about to baptize a child, he asked the father the child's name, and the father replied, "Thomas Jefferson," he answered in a loud voice, "No such unchristian name. John Adams, I baptize thee," with the other sacramental words of the rite. *Bryce's American Commonwealth, Vol. I, 642.*

The disappearance of the Federal party between 1815 and 1820 left the Republicans masters of the field. But in the United States if old parties vanish nature produces new ones. Sectional divisions soon arose among the men who joined in electing Monroe in 1820, and under the influence of the personal hostility of Henry Clay and Andrew Jack-

son (chosen President in 1828), two great parties were again formed (about 1830) which some few years later absorbed the minor groups. One of these two parties carried on, under the name of Democrats, the dogmas and traditions of the Jeffersonian Republicans. It was the defender of States' Rights and of a restrictive construction of the Constitution: it leaned mainly on the South and the farming classes generally, and it was therefore inclined to free trade. The other section, which called itself at first the National Republican, ultimately the Whig party, represented many of the views of the former Federalists, such as their advocacy of a tariff for the protection of manufacture, and of the expenditure of public money for internal improvements. *Bryce's American Commonwealth, Vol. I, 644-5.*

In 1819, when sharp contest broke out in Congress as to whether slavery should be permitted within her limits, nearly all the Northern members voted against slavery, nearly all the Southern members for. The struggle might have threatened the stability of the Union but for the compromise adopted next year, which, while admitting slavery in Missouri, forbade it for the future north of lat. 36° 30'. The danger seemed to have passed, but in its very suddenness there had been something terrible. Jefferson, then over seventy, said that it startled him "like a fire-bell in the night." *Bryce's American Commonwealth, Vol. I, 645.*

The Democratic party had by 1852 passed almost completely under the control of the slave-holders, and was adopting the dogma that Congress enjoyed under the Constitution no power to prohibit slavery in the territories. This dogma obviously overthrew as unconstitutional the Missouri compromise of 1820. The Whig leaders discredited themselves by Henry Clay's compromise scheme of 1850, which, while admitting California as a free State, appeased the South by the Fugitive Slave Law. They received a crushing defeat at the presidential election in 1852; and what remained of their party finally broke in pieces in 1854 over the bill for organizing Kansas as a territory in which the question of slaves or no slaves should be left to the people, a bill which of course repealed the Missouri compromise. Singularly enough, the two orators of the party, Henry Clay and Daniel Webster, both died in 1852, wearied with strife and disappointed in their ambition of reaching the presidential chair. Together with Calhoun, who passed away two years earlier, they are the ornaments of this generation, not indeed rising to the stature of Washington or Hamilton, but more remarkable than any, save one, among the statesmen who have followed them. With them ends the second period in the annals of American parties, which, extending from about 1820 to 1856, includes the rise and fall of the Whig party. *Bryce's American Commonwealth, Vol. I, 646.*

The Whig party having vanished, the Democrats seemed to be for the moment, as they had been once before, left in possession of the field. But this time a new antagonist was quick to appear. The growing boldness of the slave-owners had begun to alarm the Northern people when they were startled by the decision of the Supreme Court, pronounced in the case of the slave Dred Scott, which laid down the doctrine that Congress had no power to forbid slavery anywhere, and that a slave-holder might carry his slaves with him where he pleased, seeing that they were mere objects of property, whose possession the Con-

stitution guaranteed. This hastened the formation out of the wrecks of the Whigs of the new party, which took in 1856 the name of Republican, while at the same time it threw an apple of discord among the Democrats. In 1860 the latter could not agree upon a candidate for President. The Southern wing pledged themselves to one man, the Northern wing to another; a body of hesitating and semi-detached politicians put forward a third. Thus the Republicans through the divisions of their opponents triumphed in the election of Abraham Lincoln, presently followed by the secession of eleven slave States.

The Republican party, which had started by denouncing the Dred Scott decision and proclaiming the right of Congress to restrict slavery, was of course throughout the Civil War the defender of the Union and the assertor of Federal authority, stretched, as was unavoidable, to lengths previously unheard of. *Bryce's American Commonwealth*, Vol. I, 647.

If we look over Europe we shall find that the grounds on which parties have been built and contests waged since the beginning of free governments have been in substance but few. In the hostility of rich and poor, or of capital and labor, in the fears of the Haves and the desire of the Have-nots, we perceive the most frequent ground, though it is often disguised as a dispute about the extension on the suffrage or some other civic right. Questions relating to the tenure of land have played a large part; so have questions of religion; so too have animosities of jealousies of race; and of course the form of government, whether it shall be a monarchy or a republic, has sometimes been in dispute. None of these grounds of quarrel substantially affected American parties during the three periods we have been examining. No one has ever advocated monarchy, or a restricted suffrage, or a unified instead of a Federal republic. Nor down to 1876 was there ever any party which could promise more to the poor than its opponents. In 1852 the Know-nothing party came forward as the organ of native American opinion against recent immigrants, then chiefly the Irish, for German immigration was comparatively small in those days. But as this party failed to face the problem of slavery, and roused jealousy by its secret organization, it soon passed away. The complete equality of all sects, with the complete neutrality of the government in religious matters, has fortunately kept religious passion outside the sphere of politics. *Bryce's American Commonwealth*, Vol. I, 648-9.

Hamilton, who had a low opinion of mankind, but a gift and a passion for large constructive statesmanship, went so far in his advocacy of a strong government as to be suspected of wishing to establish a monarchy after the British pattern. He has left on record his opinion that the free constitution of England, which he admired in spite of the faults he clearly saw, could not be worked without its corruptions. Jefferson carried further than any other person set in an equally responsible place has ever done, his faith that government is either needless or an evil, and that with enough liberty, everything will go well. An insurrection every few years, he said, must be looked for, and even desired, to keep government in order. The Jeffersonian tendency has always remained, like a leaven, in the Democratic party, though in applying Jeffersonian doctrines that slave-holders stopped when they came to a black skin. Among the Federalists, and their successors the Whigs, and the more recent Republicans, there has never been wanting



a full faith in the power of freedom. The Republicans gave a remarkable proof of it when they bestowed the suffrage on the negroes. *Bryce's American Commonwealth, Vol. I, 651.*

There are now two great and several minor parties in the United States. The great parties are the Republicans and the Democrats. What are their principles, their distinctive tenets, their tendencies? which of them is for free trade, for civil service reform, for a spirited foreign policy, for the regulation of telegraphs of legislation, for a national bankrupt law, for changes in the currency for any other of the twenty issues which one hears discussed in the country as seriously involving its welfare?

This is what a European is always asking of intelligent Republicans and intelligent Democrats. He is always asking because he never gets an answer. The replies leave him in deeper perplexity. After some months the truth begins to dawn upon him. Neither party has anything definite to say on these issues; neither party has any principles, any distinctive tenets. Both have traditions. Both claim to have tendencies. Both have certainly war cries, organizations, interests enlisted in their support. But those interests are in the main the interests of getting or keeping the patronage of the Government. Tenets and politics, points of political doctrine and points of political practice, have all but vanished. They have not been thrown away but have been stripped away by Time and the progress of events fulfilling some policies, blotting out others. All has been lost, except office or the hope of it. *Bryce's American Commonwealth, Vol. I, 653.*

Yet one can not say that there is to-day no difference between the two great parties. There is a difference of spirit or sentiment perceptible even by a stranger when, after having mixed for some time with members of the one he begins to mix with those of the other, and doubtless much more patent to a native American. It resembles (though it is less marked than) the difference of tone and temper between Tories and Liberals in England. The intellectual view of a Democrat of the better sort is not quite the same as that of his Republican compeer, neither is his ethical standard. Each of course thinks meanly of the other; but while the Democrat thinks the Republican "dangerous" (i. e. likely to undermine the Constitution), the Republican is more apt to think the Democrat vicious and unscrupulous. So in England the Liberal fastens on stupidity as the characteristic fault of the Tory, while the Tory suspects the morals and religion more than he despises the intelligence of the Radical.

It can not be charged on the American parties that they have drawn towards one another by forsaking their old principles. It is time that has changed the circumstances of the country, and made those old principles inapplicable. They would seem to have erred rather than clinging too long to outworn issues, and by neglecting to discover and work out new principles capable of solving the problems which now perplex the country. In a country so full of change and movements as America new questions are always coming up, and must be answered. New troubles surround them; new diseases attack the nation, and have to be cured. The duty of a great party is to face these, to find answers and remedies, applying to the facts of the hour the doctrines it has lived by, so far as they are still applicable, and when they have ceased to be applicable, thinking out new doctrines conformable to the main

principles and tendencies which it represents. This is a work to be accomplished by its ruling minds, while the habit of party loyalty to the leaders powerfully serves to diffuse through the mass of followers the conclusions of the leaders and the reasonings they have employed. *Bryce's American Commonwealth, Vol. 1, 659-660.*

### Opposition Political Parties

Dr. Lieber thus shows the need of opposing parties :

The protection of the minority leads to that great institution, as it has been boldly but not inappropriately called—the opposition. A well-organized and fully protected opposition, in and out of the Legislature—a loyal opposition, by which is meant a party which opposes, on principle, the administration, or the set of men who have, for the time being, the Government in their hands; but does so under and within the fundamental law—is so important an element of civil liberty, whether considered as a protecting fence or as a creative power. *Lieber's Civil Liberty and Self-Government, 184.*

### The Free Soil Party

Extract from the Free Soil Party platform of 1842 (Stanwood, *Hist. of Presidency*, p. 240) :

Resolved. That our fathers ordained the Constitution of the United States in order, among other great national objects, to establish justice, promote the general welfare, and secure the blessings of liberty, but expressly denied to the Federal Government which they created, all constitutional power to deprive any person of life, liberty or property without due legal process.

Resolved, That, in the judgment of this convention, Congress has no more power to make a slave than to make a king; no more power to institute or establish slavery than to institute or establish a monarchy. No such power can be found among those specifically conferred by the Constitution, or derived by any just implication from them.

Resolved, That it is the duty of the Federal Government to relieve itself from all responsibility for the existence or continuance of slavery wherever the Government possesses constitutional authority to legislate on that subject, and is thus responsible for its existence.

Resolved, That the true and in the judgment of this convention the only safe means of preventing the extension of slavery into territory now free is to prohibit its existence in all such territory by an act of Congress. *182 U. S. Rep. (Note) 297.*

### Davis on Political Parties

Mr. Davis thus speaks of some of the political parties :

The Free-Soil party, which assumed the title of "Republican" party, had grown to a magnitude which threatened speedily to obtain control of the Government. Based on sectional opposition to the growth of the Southern equally with the Northern States of the Union, it had absorbed not only the avowed Abolitionists, but other diverse and heterogeneous elements of opposition to the Democratic party. Their

presidential candidates (Fremont and Dayton) had received, in 1856, 114 of a total of 296 electoral votes, representing 1,341,264 in a total of 4,054,967. The elections of 1857 showed a great diminution of the Republican strength, and the Thirty-fifth Congress was decidedly Democratic in both branches. But, during the next two years, the Kansas agitation, the dissensions in the Democratic party, occasioned by the new doctrine of squatter sovereignty, had so augmented the ranks of the Republicans that in the House of Representatives neither party had a decided majority. The contest over the election of a Speaker was kept up for more than eight weeks, and finally ended in the election of a Republican by a majority of one vote. The balance of power had been held by a few members still adhering to the virtually extinct Whig and "American," or "Know-Nothing," parties. The Senate continued Democratic, but with a decreased majority. *Davis on the History of the Confederate States*, 31.

The Know-Nothing, or American party, which sprang into existence on the decadence of the Whig organization, based on opposition to the alleged overgrowth of the political influence of naturalized foreigners and the Roman Catholic Church, had but a brief duration, and, after the presidential election of 1856, declined as rapidly as it had arisen.

The doctrine of squatter sovereignty, which soon disintegrated the Democratic party, is supposed to have been first suggested by General Cass, in 1847; but it was not until after the passage of the Kansas-Nebraska Bill, in 1854, that it was fully developed under the plastic and constructive genius of Hon. Stephen A. Douglas, of Illinois. Logically carried out, the theory of "squatter" or "popular sovereignty" bestowed on territorial legislatures, the creatures of Congress, a power not vested in Congress itself, or in any legislature in the fully organized and sovereign States, as their authority is limited both by the State and the Federal Constitutions.

Strange as it may seem, a theory founded on fallacies so transparent and leading to conclusions so paradoxical was advocated by many eminent and experienced politicians both in the North and in the South, chiefly, perhaps, under the delusive hope that it would afford a satisfactory settlement of that "irrepressible conflict" which had been declared. *Davis on the History of the Confederate States*, 32.

The first Republican Convention, held at Chicago, May 16, 1860, to nominate a candidate for the Presidency. It was a purely sectional body. Not a single delegate represented any constituency south of the famous political line of 36° 30'. Contrary to all precedent, both candidates were selected from the North. Mr. Lincoln, the candidate for the Presidency, had publicly announced that the Union "could not permanently remain half slave and half free." A fictitious issue was presented. The most fanatical foes of the Constitution were satisfied that their ideas would be the rule and guide of the party.

Meanwhile the Democratic Convention, which had met at Charleston on April 23rd, had found it impossible to agree on a platform, and hence no nomination was possible. The Convention was adjourned, to reassemble at Baltimore, where, again, the two wings of the party disagreed and held separate Conventions—the conservative (or State-rights) wing nominating John C. Breckenridge, of Kentucky, then Vice-President of the United States, for President; and Senator Joseph Lane, of Oregon, for Vice-President; and the advocates of the doctrine of

"popular sovereignty" nominating Stephen A. Douglas, of Illinois, for President; and Herschel V. Johnson, of Georgia, for Vice-President. Still another Convention, held at Baltimore, on May 19th, nominated John Bell, of Tennessee, for President, and Edward Everett, of Massachusetts, for Vice-President. This third Convention was composed of delegates from all the States, representing those who still adhered to the Whig party and the "American" organization. It repudiated all sectional and geographical issues, and pledged itself to "maintain, protect, and defend those great principles of public liberty and national safety against all enemies." It declared it to be the part of patriotism and of duty to recognize no political principle other than the Constitution of the country, the Union of the States, and the enforcement of the laws. It totally ignored the territorial question.

Thus, four distinct parties presented rival tickets and platforms to the people of the United States:

Briefly, the Constitutional-Union, or Bell-Everett, party advocated, in general terms, adherence to the Constitution, the Union, and the enforcement of the laws.

The Democratic-Conservative, or Breckenridge-Lane party asserted the right of a people of a Territory, on emerging from a territorial condition to that of a State, then to determine what should be the nature of their domestic institutions.

The party of popular sovereignty, or Douglas Johnson party, affirmed the right of the people of a Territory, in their territorial condition, to determine their organic institutions, independently of the consent of Congress, and denied the power or duty of Congress to protect the persons or property of minorities in such territories against the action of majorities.

The Republican, or Lincoln-Hamlin, party insisted that "slavery can exist only by virtue of municipal law"; that there was no law for it in the Territories, and that "Congress was bound to prohibit it or exclude it from any and every Federal Territory." In other words, it asserted the right and duty of Congress to exclude the citizens of half the States of the Union from territory belonging in common to all, unless on condition of the abandonment or sacrifice of property distinctly and specifically recognized as such by the compact of Union. *Davis on the Confederate States, 34-5.*

The *names* adopted by political parties in the United States have not always been strictly significant of their principles. The old Federal party inclined to nationalism, or consolidation, rather than federalization, of the States. On the other hand, the party originally known as Republican, and afterward as Democratic, can scarcely claim to have been distinctly or exclusively such in the primary sense of these terms, inasmuch as no party has ever avowed opposition to the general principles of Government by the people. The fundamental idea of the Democratic party was that of the sovereignty of the States and the Federal, or Confederate, character of the Union. Other elements have entered into its organization at different periods, but this has been the vital, cardinal, and abiding principle on which its existence has been perpetuated. The Whig, which succeeded the old Federal party, though by no means identical with it, was, in the main, favorable to a strong central government, therein antagonizing the trans-Atlantic traditions connected with its name. The "Know-Nothing," or "American," party,



which sprang into existence on the decadence of the Whig organization, based upon opposition to the alleged overgrowth of the political influence of naturalized foreigners and of the Roman Catholic Church, had but a brief duration, and after the Presidential election of 1856 declined as rapidly as it had arisen. *Davis on the Rise and Fall of the Confederate Government, Vol. I, 35.*

The "Free-Soil," which had now assumed the title of "Republican" party, had grown to a magnitude which threatened speedily to obtain entire control of the Government. Based, as has been shown, upon sectional rivalry and opposition to the growth of the Southern equality with the Northern States of the Union, it had absorbed within itself not only the abolitionists, who were avowedly agitating for the destruction of the system of negro servitude, but other diverse and heterogeneous elements of opposition to the Democratic party. In the Presidential election of 1856, their candidates (Fremont and Dayton) had received 114 of a total of 296 electoral votes, representing a popular vote of 1,341,264 in a total of 4,053,967. *Davis on the Rise and Fall of the Confederate Government, Vol. I, 36.*

Since the war between the states, the contests have been between the Democratic and Republican parties. The Prohibition party has on several occasions placed candidates in the field for president and vice-president, so has the Populist and Social parties; but their strength as parties was negligible. Their strength has been most effective when amalgamated with the two great parties.

The Populist party was the outgrowth of societies or organizations of farmers for the purpose of eliminating the merchants, or middlemen, who profited on the products of the farmers and manufacturers. The idea was to have the producer and consumer to deal directly each with the other. These societies were at first strictly non-political, or professed so to be. They at first assumed the name of the Grangers, then Farmers' Alliance. They finally drifted into or were transformed into political parties, at first called Populist party, then Jeffersonian Democrats. From 1880 to 1895 the parties thrived and were strong in the Southern and Western states. They elected their tickets in many states as to state and county officers, but never became very powerful in national politics.

### Political Parties a Need

Mr. Madison thus portrays the necessity of parties in government:

In every political society parties are unavoidable. A difference of interests, real or supposed, is the most natural and fruitful source of them. The great object should be to combat the evil: 1. By establishing a political equality among all. 2. By withholding unnecessary op-

opportunities from a few to increase the inequality of property by an immoderate, and especially an unmerited, accumulation of riches. 3. By the silent operation of laws which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort. 4. By abstaining from measures which operate differently on different interests, and particularly such as favor one interest at the expense of another. 5. By making one party a check on the other, so far as the existence of parties can not be prevented nor their views accommodated. If this is not the language of reason, it is that of republicanism.

In all political societies different interests and parties arise out of the nature of things, and the great art of politicians lies in making them checks and balances to each other. Let us, then, increase these *natural distinctions*, by favoring an inequality of property; and let us add to them *artificial distinctions*, by establishing *kings*, and *nobles*, and *plebeians*. We shall then have the more checks to oppose to each other; we shall then have the more scales and the more weights to perfect and maintain the equilibrium. This is as little the voice of reason as it is that of republicanism.

From the expediency, in politics, of making natural parties mutual checks on each other, to infer the propriety of creating artificial parties in order to form them into mutual checks, is not less absurd than it would be in ethics to say that new vices ought to be promoted, where they would counteract each other, because this use may be made of existing vices. *4 Writings of Madison, p. 469.*

### Politics of Clay and Webster

Mr. Blaine thus compares and contrasts the lives and works of Mr. Clay and Mr. Webster:

They both lived long enough to see the work of their political life imperiled if not destroyed. They had held the same relation to the Whigs that the elder Adams and Hamilton had held to the Federalists, that Jefferson and Madison had held to the Republicans. Comparison between them could not be fairly made, their inherent qualities and personal characteristics differed so widely. Each was superior to the other in certain traits, and in our public annals thus far each stands unequaled in his sphere. Their points of contrast were salient and numerous. Mr. Clay was born in Virginia. Mr. Webster was born in New England. Mr. Clay was a devoted follower of Jefferson. Mr. Webster was bred in the school of Hamilton. Mr. Clay was an earnest advocate of the second war with Great Britain. Mr. Webster was its steady opponent. Mr. Clay supported Madison in 1812 with great energy. Mr. Webster threw all his strength for DeWitt Clinton. Mr. Clay was from the first deeply imbued with the doctrine of protection. Mr. Webster entered public life a pronounced free-trader. They were not members of the same political organization until after the destruction of the old Federal party to which Mr. Webster belonged, and the hopeless divisions of the old Republican party to which Mr. Clay belonged. They gradually harmonized towards the close of Monroe's second term, and became firmly united under the administration of John Quincy Adams. *Blaine's Twenty Years in Congress, p. 106.*

In all the discussions of the Senate in which constitutional questions were involved, Mr. Clay instinctively deferred to Mr. Webster. In the parliamentary debates which concerned the position of parties and the fate of measures, which enchained the Senate and led captive the people, Mr. Clay was *facile princeps*. Mr. Webster argued the principle. Mr. Clay embodied it in a statute. Mr. Webster's speeches are still read with interest and studied with profit. Mr. Clay's speeches swayed listening senates and moved multitudes, but reading them is a disappointment. Between the two the difference is much the same as that between Burke and Charles James Fox. Fox was the parliamentary debater of England, the consummate leader of his party. His speeches, always listened to and cheered by a crowded House of Commons, perished with their delivery. Burke could never command a body of followers, but his parliamentary orations form brilliant and permanent chapters in the political literature of two continents. *Blaine's Twenty Years in Congress*, p. 107.

### "Tammany Hall" in Politics

Tammany Hall grew out of the Columbian Society, formed in 1789 by William Mooney, an Irish-American Whig. The purposes of the society were at first social, though from the very beginning it strove for political influence. In 1805 it changed its name to the "Tammany Society." This name was borrowed from an Indian chief Tammanend, and the society was organized in Indian fashion. The society was composed of thirteen "tribes," with twelve "sachems" or directors, a "grand sachem" or president, a "sigamore" or master of ceremonies and a "wiskinski" or doorkeeper. With the change in name came a change in purpose. From a social club it developed into a political organization. *Bryce's American Commonwealth*, Vol. II, 339-40.

### Anarchism

A kind of social propaganda or doctrine based on the abolition of all constitutional authority, government and law. It teaches or professes to believe that the individual should be free from governmental control. In its political and moral theories, teachings and creeds, it is the antithesis of socialism. Anarchy demands the destruction of the State by force and violence, if necessary, while socialism would use the State for the purpose of reorganizing society, to attain the end of socialism. It would have the State, or the whole of society, to own and control all property, or controlling all engaged in the industrial world-work. Anarchy demands absolute and unrestrained liberty of the individual. One of the sayings of one of the apostles of Anarchy was that "liberty without (economic) socialism is equivalent to privileged injustice, and that socialism without (anarchical) liberty amounts to both slavery and brutality.

Socialism is well organized. Anarchy, from its very nature, is disorganized, absolute independence and individualism, each anarchist being a law unto himself. Anarchy, because of its lawless character and teachings, is promoted and spread by secret meetings, teachers and publishers. Their first aim seems to be to assassinate the crown heads and even the rulers and high officers of republics. Social democracy has expelled and dissolved bands and societies which professed to be socialistic because of their nefarious teachings and practices, such as the I. W. W.'s in the United States. In some countries, however, the anarchist element predominates that of the socialistic Democracy, such seems to be the case in Italy, Spain, Greece and Latin America.—The New International Encyclopedia.

Anarchy, in all periods, has demanded the abolition of the State, or all Government, and all privately owned or controlled property under force of law, and to enact a new order of society upon a basis of individual interests, a union of Egoists, or at best a mere federation of commoners. It has a doctrine entirely different from Socialism, called the "propaganda of the deed," the use of violence, dynamite, and bombs, to destroy the rulers and government property. Two of these deeds are well known in the United States. The Haymarket Explosion in Chicago, May 4, 1886. The other was the assassination of President McKinley at Buffalo, N. Y., Sept. 6, 1901, by Czolgosz. In 1902 Congress prohibited the immigration into the United States of all persons belonging in or teaching the doctrine of Anarchism.

Anarchism, socialism and communism all tend in the end to the destruction of all existing governments, whether they be monarchies, aristocracies, republics, or democracies. One by force and violence, the other by evolution, by ingrafting upon the existing governments scions of other teachings and belief, until, the original is entirely destroyed or disappears, and their utopian one substituted instead.

The great faults of socialism and anarchism is that each is destructive and not constructive. Each seeks to obtain a common level among all mankind by pulling down the high and not by building up the low. The doctrines are well calculated to destroy any kind of government, that which is good as well as that which is bad.

In their creeds they profess some virtues and many vices. They profess no virtues of government which is not possessed and guaranteed by our American Constitutional Government,



and most of their vices are forbidden and guaranteed against by the American Constitution. The resultant of all their tenets and teachings are contrary to the laws of nature and Nature's God, as well as those of all civilized governments. It is possible for them to destroy all civil government but they could never establish one which could produce or secure the ultimate end desired because contrary to all nature and reason. Their effort to this end is like a strong man trying to lift himself by pulling at his boot straps. They forget that action is equal to re-action and in the opposite direction.

Their efforts are to be feared because well calculated to destroy all that is in our Government that is worth preserving and reduce the people to a state of barbarism rather than a high state of civilization. Their efforts to destroy the government tends to cause the people of America to create a strong central Government which can crush Anarchy and control Socialism. They are thus assisting in destroying local self-government.

### **Socialism**

Socialism is probably the only international political party. Its main object and purpose seems to be a kind of ideal economic system in which most all industries are to be carried on under social direction and for the benefit of society as a whole. For a long time it was closely akin to communism and anarchism; and in some countries, allied with both. As time went on these three parties or sects separated and socialism is now almost the reverse of anarchism. Socialism has been nationalism and collectivism. It, as a political party, is now mostly called Social Democracy. Extreme socialists, and anarchists, believe that all land and other property should be owned and controlled by society as a whole, and each individual given a part of the rents, profits or usufructs thereof. The more conservative, however, do not insist upon the communism of all property, but only of the chief kinds, that which is now affected by a public trust or use. All contend that there should be such collective ownership and control of property that it will dominate the world's work. Socialism contends that all values depend upon labor, and that all profits from property or industries should be divided by society among the people.

Socialism demands collective management of all industries and all associated together and a distribution of all increase and profit by means of some common authority. Communism

would wipe out all boundaries of nations or states and substitute therefor a universal fraternity among all the tribes of the world. Socialism does not worship patriotism, nor seek to cultivate it. It teaches universal brotherhood of men. It claims that wars are declared and carried on for the benefit of a small class of people, who are engaged in military affairs and industries, which, of necessity, must thrive during and on account of wars. There are, however, certain wars which they claim to be necessary, such as may be necessary to consolidate or to force all nations into one common brotherhood of socialism. Socialism therefore abhors and opposes toilers of one nation fighting and killing the toilers of other nations on account of purely national differences, which can not benefit the toilers of either, but strengthen the military and aristocratic classes, which live and thrive on wars, which always kills many and impoverishes all toilers.

At one time, socialism, like anarchism, despised all kinds of government, state or nation, which was to rule the people. Both parties, however, profess to believe in some kind of organism, but it is only for the purpose of destroying or changing existing governments and to establish socialism, communism and anarchism. All three oppose public or official authority, and believe that the people can form some kind of mutual aid federations. Anarchists believe in destroying existing governments by force, while socialism believes in destroying them by evolutionary methods. Socialism once opposed marriage as oppressive of women, socialists once taught that the only bond which ought to tie man and woman was mutual love one for the other, and if that ceased, or was weakened, then the relation of man and wife should cease, and a new union formed with others. This doctrine is not now advocated by the majority of socialists. Socialism has also undergone radical changes as to religion. Religion is now held to be a private matter with which the public is not concerned.

Socialism was formerly utopian, it has recently professed to discard this and become scientific. Few political Economists are socialists. Their theories of government, as a rule, do not agree. Political economists believe that the evils outweigh and outnumber the good to come of unified production. Few socialists contend that agriculture could or should be unified, as claimed for other industries. Socialism presupposes capitalism, as agriculture has not yet been capitalized, this is probably why agricultural labor has not been socialized as other indus-

tries. Socialism is opposed to militarism. It teaches that the chief causes of war are economic, to control the commerce of the world, and the industries of the world which feed commerce. Jefferson held to these views to state the case strongly against the then strongest nation on the earth, which then desired to control the commerce of the world, he said it would sacrifice the liberties of everything on earth in order to land one more ship load of wheat at its ports. Wherever organized capital exists, there is found socialism. Socialism is now organized into a political party known as the Social Democracy. It is more powerful in Germany than in any other nation. It was there formed but has spread to every other nation. It is, however, international, it seeks not to establish the government of any particular nation, but to destroy that of all, and set up one of its own, for all nations and peoples. It does not teach patriotism, it barely professes it in a small degree. Like most all political parties, it advocates some good creeds which would improve most any government. Many of its creeds are bad, and wholly impracticable. Taken as a whole, even as now bettered and tempered, the government, or association of mankind, sought to be established is yet largely utopian and impracticable. It may succeed in destroying all existing governments, but can never establish the kind it proposes and desires. If it ever succeeds in destroying the existing governments, it will be by revolutions, which will end in anarchy. All the doctrines of socialism that are practical and worth preserving are taken from the principles of American Constitutional Government. The government or association of Socialism desired to be established is contrary to the laws of nature and hence it could not long exist.

The one chief fault in the association it would establish is that it gives the people no protection against themselves. This is as necessary as to protect them from the government itself. This is the crowning virtue of American Constitutional Government, it protects the people against both the government and themselves. One is as necessary as the other. Without the one the government will become monarchial and despotic; without the other, it will become anarchial; the latter is as despotic and more cruel than the other.

The American Constitutional Government is midway between these two extremes. As we centralize and increase the powers of the Government, we tend towards a monarchy and despot-

ism; as we tend towards depriving the government of all power, we tend towards anarchy, which is equally despotic and cruel.

The following are among the demands of the German Social Democracy, many and the best of which are now secured and guaranteed to the people of the United States, by their written, State and Federal Constitution:

(1) Universal, equal, and direct suffrage by ballot, in all elections, for all subjects of the Empire over twenty years of age, without distinction of sex; proportional representation and, until this system has been introduced, fresh division of electoral districts by law after each census; two years' duration of the Legislature; holding the elections on a legal day of rest; payments of the representatives elected; removal of all restrictions upon political rights, except in the case of persons under age.

(2) Direct legislation by the people by means of the right of initiative and of veto; self-government by the people in Empire, state, province, and commune; election of magistrates by the people, with the right of holding them responsible; annual vote of the taxes.

(3) Universal military education; substitution of militia for a standing army; decision by the popular representatives of questions of peace and war; decision of all international disputes by arbitration.

(4) Abolition of laws which restrict or suppress free expression of opinion and the right of meeting or association.

(5) Abolition of all laws which place the woman whether in a private or public capacity, at a disadvantage as compared with the man.

(6) Declaration that religion is a private matter; abolition of all appropriations from public funds for ecclesiastical and religious objects; ecclesiastical and religious bodies are to be regarded as private associations which order their affairs independently.

(7) Secularization of education; compulsory attendance at public national schools; free education, free supply of educational apparatus, and free maintenance to children in schools, and to such pupils, male and female, in higher educational institutions, as are judged to be fitted for further education.

(8) Free administration of the law and free legal assistance; administration of the law by judges elected by the people; appeal in criminal cases; compensation to persons accused, imprisoned, or condemned unjustly; abolition of capital punishment.

(9) Free medical assistance, and free supply of remedies; free burial of the dead.

(10) A graduated income and property tax to meet all public expenses which are to be raised by taxation; self-assessment; succession duties, graduated according to the extent of the inheritance and the degree of relationship; abolition of all indirect taxation, customs duties, and other economic measures which sacrifice the interests of the community to the interests of a privileged minority.

For the protection of labor, the German Social Democrats also demand, to begin with:

(1) An effective national and international system of protective legislation on the following principles:



(a) The fixing of a normal working day, which shall not exceed eight hours.

(b) Prohibition of the employment of children under fourteen.

(c) Prohibition of night work, except in those branches of industry which, from their nature and for technical reasons or for reasons of public welfare, require night work.

(d) An unbroken rest of at least thirty-six hours for every workman every week.

(e) Prohibition of the truck system.

(2) Supervision of all industrial establishments, together with the investigation and regulation of the conditions of labor in the town and country by an Imperial labor department, district labor bureaus, and chambers of labor; a thorough system of industrial sanitary regulation.

(3) Legal equality of agricultural laborers and domestic servants with industrial laborers; repeal of the laws concerning masters and servants.

(4) Confirmation of the rights of association.

(5) The taking over by the Imperial government of the whole system of workmen's insurance, though giving the workmen a certain share in its administration. *The New International Encyclopedia*, Vol. 21, 238-9.

Many of the above tenets declare virtues, and not vices, in any government. Some, however, are vices, which would destroy any government or association and result in a condition of society little better than anarchy, as it is popularly understood. The end and condition of government which the socialistic party hopes to attain and the means to attain it are probably best described by Mr. Bellamy, in his book, *Looking Backward*, from 2000 to 1887.

This book is an interesting and intensely romantic narrative, and well sets forth the reforms which the Social and Communist, hope to attain when their teachings and doctrines are adopted. The conditions so well described by Mr. Bellamy's Dr. Leete are purely idealistic and unnatural. That Mr. Bellamy's Mr. West should have slept for one hundred and thirteen years and then be awakened by the great grand daughter of his fiancee of the other century, and he and she renew the old love affair and become engaged is just as natural and just as much in accord with the laws of nature as is the conditions of the society and government which Dr. Leete, the father of the last fiancee, described to Mr. West. The trouble with all these Socialistic forms of government and conditions of society, they are wholly utopian, unnatural and unattainable. Human nature is now and ever will be what it has been for two thousand years, and these conditions pictured are not in accord with human nature.

Judge Dillon has said that there may be some reasons for Socialism, Communism and even Anarchism among the people of the Old World but that there is none in the United States. Here every one may be the owner of property and in possession of liberty and hence is in necessity of government and law. He is secured both in his property and his liberty. Communism, Socialism and Anarchism are legitimate offsprings of Aristocracy, Casts and Despotism, forced on the people by hunger and despair. Here such ideas are baneful exotics, which have taken deep root, and thus far have attracted little notice except when their wild or bad adherents seek to propagatate them by illegal violence or murder.

Sidney Smith has said that as late as the nineteenth century the laws of the Old World, even of the best nations and states, were so oppressive as to drive the people to such thoughts as Socialism and Anarchy. He said that in 1803 the game laws were so oppressive that for every ten pheasants which fluttered in the wood, one English peasant was rotting in jail. Prisoners were then tried for their lives without counsel, and the punishment was cruel and vindictive. The laws of debt knew no clemency, exemption nor redemption. Not a murmur was allowed against any abuse that was committed. To say a word by mouth or press against such cruel punishment was to be condemned of treason.

Hon. Henry B. Brown, of the United States Supreme Court, in an address before the American Bar Association in 1893, spoke as follows on the subject of property rights and their distribution :

The right of private property, which marks the first step in the emergence of the civilized man from the condition of the utter savage, has been the cause of so much of envy, hatred, malice and all uncharitableness that the whole system is denounced by a certain school of theorists as not only an error; but a fraud; in short, that property is robbery; that the State is or ought to be the sole proprietor, and the individual only the recipient of its bounty.

By another school it is insisted that, as nearly everything we consume or enjoy is the product of labor, the laborer is entitled to the product. The logical consequence is that the capitalist has few, if any, rights which the laborer is bound to respect. Exactly what his rights are upon this theory no one has as yet had the hardihood to proclaim.

These conflicts between capital and labor are not of recent date. Indeed, they have occurred from a time whence the oldest historical records run not to the contrary. One of the earliest recorded annals of the race is that of the exodus of the Israelites from Egypt, which seems to have been a national protest against the oppression of capital, and to have possessed the substantial characteristics of a modern strike.

How far this revolt was due to the order of Pharaoh that the Israelites should provide their own straw to make bricks, and how far to the hereditary aversion of the Jewish race to manual labor, we shall not know, at least until we hear the Egyptian side of the story. *Henry B. Brown, in Report of American Bar Association, Vol. 16, 213-14.*

We are told, however, by a certain school of political philosophers which, for the want of a better name, we will call the Henry George school, that in progress of modern social life the gulf between the rich and the poor is constantly growing wider—in other words, that the rich are growing richer, while the poorer are becoming poorer. If this were true, it would doubtless afford just cause for alarm, but while it sounds well as an aphorism, unfortunately, or rather fortunately, it is wholly untrue. While, in this country, at least, private fortunes are larger than they have ever been before, the condition of the laboring class has improved in an equal ratio. *Henry B. Brown, in Report of American Bar Association, Vol. 16, 219.*

Judge Brown, in speaking of the schemes for the distribution of property, says:

The most radical and at the same time the most futile of these schemes is what is known as Socialism, by which we understand the total abolition of private property and the ownership of all property by the State—the individual retaining only the right to the enjoyment of his proportionate share. The entire community thus becomes in effect a great partnership, in which each partner is expected to contribute his proportion of labor, and to receive an equal share in its products. As a practical question, in this country at least, socialism may be disposed of in a few words. As it involves a practical confiscation of private property, it could only be established legally by an amendment to the Constitution of the State, which would require the assent of a majority of the voting population. It would probably also require an amendment to the Constitution of the United States, which could only be adopted by the consent of three-fourths of the States. Either of these contingencies is so remote that it may be safely relegated to the region of impossibilities. It is equally improbable that socialism can ever be imposed by force, since the owners of property or their dependents are not only in the majority numerically, but, by reason of such ownership, wield a moral and physical influence out of all proportion to their numbers. Socialism, therefore, while furnishing an interesting field for discussion, is not likely for another century at least to present itself as a scheme for practical consideration. *Henry B. Brown, in Report of American Bar Association, Vol. 16, 225-6.*

Upon the whole, socialism, so far from serving as a remedy for the evils which afflict society, would only aggravate them tenfold; so far from being an advance, it would be a distinctly retrograde movement, a return to the barbarous ideas of our remote ancestors.

There is another coarser form of social regeneration known as *anarchism*, of which little need be said. Anarchism openly avows its intent to destroy all existing social institutions by force, while offering nothing to take their place. Its aim is not to reconstruct society, but simply to destroy it. Threats are its sole argument, dynamite its principal weapon. Its motive is hatred of the higher classes, not love of

the lower. So far, no writer of distinction has been found bold enough to advocate its claims; indeed, it does not condescend to argue; it simply strikes. Happily, its disciples are few, and, to the credit of the American character, let it be said, almost exclusively aliens. Society has nothing to fear from them except so far as it fears the dangerous animal or the venomous reptile. They are fit subjects for the application of the scriptural maxim that those who take the sword shall perish by the sword. Those who fight with fire must expect to be fought with fire. Society is neither meek nor long-suffering and will rigorously exact an eye for an eye and a tooth for a tooth. Those who openly defy and trample upon the Constitution and laws have no moral right to their immunities and no just cause to complain if society makes war upon them as mercilessly as they war upon society. *Henry B. Brown, in Report of American Bar Association, Vol. 16, 230.*

Perhaps it may be proper in this connection to say a word upon the proposed naturalization of land or ownership of land by the State, which a new school of political theories would seek to accomplish by the imposition of all taxes upon land in its unimproved state. This is commonly known as the *Single Tax* theory. There is certainly something to be said in its commendation. It would have a strong tendency to encourage the purchase of land for actual use and the erection of valuable buildings, or other improvements, since they would be exempt from taxation. It would put a complete stop to the purchase of lands for speculative purposes, which doubtless operates to retard the growth of our cities and towns and to the leaving of large amounts of vacant and unimproved property within our municipal limits. Builders are thus driven out of town to find lots suitable to their means, where if land were free or comparatively so, they would prefer a location upon the nearest unimproved lot. How far it would tend to improve the relations between capital and labor, to obviate strikes and to open new avenues for employment and for trade is an open question. My impression is that its advantages in these particulars have been greatly overestimated. *Henry B. Brown, in Report of American Bar Association, Vol. 16, 234.*

#### Judge U. M. Rose says of Socialism :

No one complains so much of officials as the socialist; and yet he proposes a plan that would cover the land with officials like the locusts of Egypt. Such an officialism would establish a slavery more terrible and exasperating than any that has ever been known, which would have no other merit than that it could not last for more than a single day. As there would be no large rewards without infringement on the sacred principle of equality, the mainspring of enterprise would be broken. Bad as the world is, there is still room for congratulation that the schemes of the socialist, involving a life without ambition and without hope, a mere existence of dreary monotony, only enlivened by the vexation caused by petty officials, is something beyond the range of possibility; a conclusion that rests upon experiment as well as induction, for socialism has been often tried in small and homogeneous communities made up of men strong in the faith, and has as often failed ignominiously. *U. M. Rose in Report of American Bar Association, Vol. 16, 308.*



**Communism**

Communism, is a political society or creed, which believes in and teaches an abolition of all private property and a vesting of title in all the people as a common whole, or as tenants in common, the needs of each to be supplied from the increase profits or usufruct of the whole. It is the economical basis of both anarchy and socialism. Like anarchy and socialism, it is utopian and visionary. The followers of the three societies believe that the whole world can be formed into a common brotherhood or society in which the brotherhood or society shall own and control all the property for the common good of each. They thus believe in a state or condition without government or law, in which each shall be fed, clothed and educated, cared for during life, and buried when dead, out of a common store-house. There has sprung up many societies, sects, and colonies in the United States which attempted to teach and to lead to this doctrine. Like all other utopian doctrines, they thrive for a while, but soon dissolve and disappear. As a rule, the leaders and disciples who profess and teach such dogmas are utopian dreamers who, of course, deceive and mislead many ignorant people, especially those whom poverty has oppressed, and those who hope to live without work.

The great evil of anarchy, communism, and socialism is that they each tend to destroy all individuality and personal ambition. They seek to establish uniformity by pulling down and not in building up. They stifle and throttle all competition, in trades, business and husbandry. It creates in each individual the desire to do as little as possible, and get as much as he can from the common store-house. Their creeds are contrary to all scientific and historical teachings as to what is necessary to produce a good government or a great man. If the world should accept and follow their teachings, humanity would retrograde instead of progress, and in a few generations, our high civilization would be little better than savagery and barbarism, education would be ignorance, and religion idolatry.

Of course, the leaders and teachers of anarchy, communism and socialism do not believe that such would be the result of their philosophy and creeds; but others contend it would because they lead inevitably to destruction and not to creation, level the whole, by pulling down the high and not in building up the low, destroy all individual ambition, and take from

every one the desire or hope of ever excelling others. Do as little as you can but get as much as possible. This is contrary to the laws of Nature and of God, as well as to the laws of all great civilized nations. The doctrines are pernicious and destructive.

### **The Right of Revolution.**

The right of revolution is\*the inherent right of a people to cast out their rulers, change their polity, or effect radical reforms in their systems of government or institutions, by force or a general uprising, when the legal and constitutional methods of making such changes have proved inadequate, or so obstructed as to be unavailable.<sup>1</sup> *Black on Constitutional Law, 11.*

In the presence of revolution, law is impotent. It is indeed, a great task of practical politics to bring back revolutionary movements as soon as possible into the regular channels of constitutional reform. There can be no right of revolution, unless exceptionally; it can only be justified by that necessity which compels a nation to save its exercise or to secure its growth where the ways of reform are closed. The Constitution is only the external organization of the people, and if, by means of it, the State itself is in danger of perishing, or if vital interests of the public weal are threatened, necessarily knows no law.<sup>2</sup> *Black on Constitutional Law, 12.*

### **Revolution of Rhode Island**

When the separation from England took place, Rhode Island did not, like the other States, adopt a new Constitution, but continued the form

The war between the States from 1861-65 was really a revolution to decide by force as to whether or not the institution of slavery should be abolished. The constitutional government then authorized it. The majority of the States, but not three-fourths of them, desired the abolition of the institution. The majority controlling the Legislature and executive departments of the government denied to the minority their constitutional rights as to slavery and the minority would not submit and seceded which was in fact and in truth a revolution. They failed and slavery was abolished, by force of arms as a war measure. It required an amendment of the Constitution before the institution was abolished lawfully. That this amendment was necessary shows the minority was not wrong in their contentions as to their constitutional rights. The pity is that the Constitution could not have been amended without the war.

The Southern States chose to call this action secession rather than revolution because they claimed and desired to stand by and live up to the Constitution, but were denied the privilege by the majority of the Northern States. The position of the Northern States was that the Union could not

be preserved, half slave, and half free, that those States had abolished slavery and that the Southern States could if they would, but that they would not. That the Union must be preserved if the Constitution had to be violated so to do. That slavery must be abolished peaceably if possible, but forcibly if necessary. The Northern States therefore fought to preserve the Union, the Southern States to preserve the Constitution. The Northern States had no constitutional right to abolish slavery in the Southern States or to coerce the Southern States back into the Union. They did both by force of arms, and contrary to the Constitution.

<sup>2</sup>In the war between the States, the Northern States sought to preserve the Union in spite of the Constitution. The Southern States to preserve the Constitutions, State and Federal. The Union was preserved; but the Constitution had to be amended to accord with the views of the Northern States. If the result of war had been different, the Federal Constitution would still have required amendment in order to give the Federal Government power to have prohibited slavery in any of the States.

of government established by the charter of Charles II. in 1663; making only such alterations, by acts of the legislature, as were necessary to adapt it to their condition and rights as an independent State. It was under this form of government that Rhode Island united with the other States in the Declaration of Independence, and afterwards ratified the Constitution of the United States and became a member of this union.

In this form of government, no mode of proceeding was pointed out by which amendments might be made. It authorized the legislature to prescribe the qualification of voters, and in the exercise of this power the right of suffrage was confined to freeholders, until the adoption of the Constitution of 1843. *7 How., 35.*

The people became dissatisfied with the charter government particularly with the restriction upon the right of suffrage. The people addressed memorials to the legislature calling for a change, but none were authorized by the law-making body. The people called a convention by voluntary meetings and framed a Constitution and provided for submitting it to the people for ratification.

Upon the return of the votes, the convention declared that the Constitution was adopted and ratified by a majority of the people of the State, and was the paramount law and Constitution of Rhode Island. And it communicated this decision to the government under the charter government, for the purpose of being laid before the legislature; and directed elections to be held for a governor, members of the legislature, and other officers under the new Constitution. These elections accordingly took place, and the governor, lieutenant-governor, secretary of state, and senators and representatives thus appointed, assembled at the city of Providence on May 3, 1842, and immediately proceeded to organize the new government, by appointing the officers and passing the laws necessary for that purpose.

The charter government did not, however, admit the validity of these proceedings, nor acquiesce in them. On the contrary, in January, 1842, when this new Constitution was communicated to the governor, and by him laid before the legislature;—it passed resolutions declaring all acts done for the purpose of imposing that Constitution upon the State to be an assumption of the powers of government and of the people at large; and that it would maintain its authority and defend the legal and constitutional rights of the people. *7 How., 36.*

But, notwithstanding the determination of the charter government and to those who adhered to it, to maintain its authority, Thomas W. Dorr, who had been elected governor under the new Constitution, prepared to assert the authority of that government by force, and many citizens assembled in arms to support them. The charter government thereupon passed an act declaring the State under martial law, and at the same time proceeded to call out the militia, to repel the threatened attack, and to subdue those who were engaged in it. In this state of the contest, the house of the plaintiff, who was engaged in supporting the authority of the new government, was broken and entered in order to arrest him. The defendants were, at the time, in the military service of the old government, and in arms to support its authority.

It appears, also, that the charter government, at its session of January, 1842, took measures to call a convention to revise the existing form of government and after various proceedings, which it is not

material to state, a new constitution was formed by a convention elected under the authority of the charter government, and afterwards adopted and ratified by the people; the times and places at which the votes were to be given, the persons who were to receive and return them, and the qualification of the voters, having all been previously authorized and provided for by law passed by the charter government. This new government went into operation in May, 1843, at which time the old government formally surrendered all its powers; and this Constitution has continued ever since to be the admitted and established government of Rhode Island. *7 How., 37.*

The course of Rhode Island was mainly governed by the consideration that her superior advantages of location, and the possession of what was supposed to be the best harbor on the Atlantic coast, should not be subjected to the control of a Congress which was by that instrument expressly authorized "to regulate commerce with foreign nations and among the several states," and which also declared that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, nor any vessel bound to or from one State to be obliged to enter, clear, or pay duties in another."

That the spirit which actuated Rhode Island still exists, and is found in other States of the Union, may be inferred from the fact that at no time since the formation of the Union has there been a period when there were not to be found in the statute-books of some of the States acts passed in violation of this provision of the Constitution, imposing taxes and other burdens upon the free interchange of commodities, discriminating against the productions of other States, and attempting to establish regulations of commerce which the Constitution says shall only be done by the Congress of the United States. *135 U. S., 728.*

### **The Act of Nullification**

The following is the Act of Nullification, as declared in an address by the people of South Carolina, to the people of the United States:

We, the people of South Carolina assembled in Convention in our sovereign capacity, as one of the parties to the compact, which formed the Constitution of the United States, have declared the act of Congress, approved the 14th of July, 1832, to alter and amend the several acts imposing duties on imports, and the acts, which it alters and amends,—to be unconstitutional, and therefore null and void; and have invested the Legislature of the State with power to adopt such measures, not repugnant to the Constitution of the United States, nor of this State, as it may deem proper, to carry the same into effect. In taking this step, we feel it to be due to the intimate political relations existing between the States of the Union, to make known to them, distinctly, the principles on which we have acted, with the cause and motive by which we have been influenced;—to fulfill which is the object of the present communication. *6 Calhoun's Works, pp. 193-4.*

### **History of Nullification**

The history, error and evils of nullification, are set forth by Mr. Madison, Vol. 4, p. 395, of his works. He proves indisput-



ably, that a single state has no constitutional right or power to annul or suspend the operation of a law of the United States. This doctrine was attempted to be saddled on Mr. Jefferson, and Madison defends him against the doctrine. He says among other things:

And this newfangled theory is attempted to be fathered on Mr. Jefferson, the apostle of republicanism, and whose own words declare that "acquiescence in the decision of the majority is the vital principle of it." (See his Inaugural Address.)

Well might Virginia declare, as her Legislature did by a resolution of 1833, that the resolutions of 1789-99 gave no support to the nullifying doctrine of South Carolina. And well may the friends of Mr. Jefferson disclaim any sanction to it or to any *constitutional* right of nullification from his opinion. His meaning is fortunately rescued from such imputations by the very document procured from his files and so triumphantly appealed to by the nullifying partisans of every description. In this document the remedial right of nullification is expressly called a *natural* right, and, consequently, not a right derived from the Constitution, but from abuses or usurpations, releasing the parties to it from their obligation. *4 Writings of Madison, p. 410.*

He also adds:

The main pillar of nullification is the assumption that sovereignty is a unit at once indivisible and unalienable; that the States, therefore, individually retain it entire as they originally held it; and, consequently, that no portion of it can belong to the United States.

But is not the Constitution itself necessarily the offspring of a sovereign authority? What but the highest political authority, a sovereign authority, could make such a Constitution, a Constitution which makes a Government; a Government which makes laws; laws which operate like the laws of all other Governments, by a penal and physical force, on the individuals subject to the laws; and, finally, laws declared to be the supreme law of the land, anything in the Constitution or laws of the individual States notwithstanding.

And where does the sovereignty which makes such a Constitution reside? It resides, not in a single State, but in the people of each or the several States, uniting with those of the others in the express and solemn compact which forms the Constitution. To the extent of that compact or Constitution, therefore, the people of the several States must be a sovereign as they are a united people.

In like manner the constitutions of the States, made by the people as separated into States, were made by a sovereign authority, by a sovereign residing in each of the States, to the extent of the objects embraced by their respective constitutions. And if the States be thus sovereign, though shorn of so many of the essential attributes of sovereignty, the United States, by virtue of the sovereign attributes with which they are endowed, may to that extent be sovereign, though destitute of the attributes of which the States are not shorn.

Such is the political system of the United States, *de jure* and *de facto*; and however it may be obscured by the ingenuity and technicali-

ties of controversial commentators, its true character will be sustained by an appeal to the law and the testimony of the fundamental charter. *4 Writings of Madison, pp. 419-420.*

### Nullification and Secession Distinguished

Mr. Webster thus describes their differences:

Nullification, Sir, is as distinctly revolutionary as secession; but I can not say that the revolution which it seeks is one of so respectable a character. Secession would, it is true, abandon the Constitution altogether; but then it would profess to abandon it. Whatever other inconsistencies it might run into, one, at least, it would avoid. It would not belong to a government, while it rejected its authority. It would not repel the burden, and continue to enjoy the benefits. It would not aid in passing laws which others are to obey, and yet reject their authority as to itself. It would not undertake to reconcile obedience to public authority with an asserted right of command over that same authority. It would not be in the government, and above the government, at the same time. But though secession may be a more respectable mode of attaining the object than nullification, it is not more truly revolutionary. Each, and both, resist the constitutional authorities; each, and both, would sever the Union and subvert the government. *3 Webster's Works. (7th. ed.), pp. 490-491.*

NOTE—The South did not "abandon" the Constitution when it seceded. It re-declared its faith therein. It was the North that abandoned or discarded parts of the Constitution. The North fought to preserve the Union; but to destroy parts of the Constitution.

Mr. Davis, the President of the Confederacy, thus distinguishes them:

Nullification and secession are often erroneously treated as if they were one and the same thing. It is true that both ideas spring from the sovereign right of a State to interpose for the protection of its own people, but they are altogether unlike as to both their extent and the character of the means to be employed. The first was a temporary expedient, intended to restrain action until the question at issue could be submitted to a convention of the States. It was a remedy which its supporters sought to apply within the Union; a means to avoid the last resort—separation. If the application for a convention should fail, or if the State making it should suffer an adverse decision, the advocates of that remedy have not revealed what they proposed as the next step—supposing the infraction of the compact to have been of that character which, according to Mr. Webster, dissolved it.

Secession, on the other hand, was the assertion of the inalienable right of a people to change their government, whenever it ceased to fulfill the purposes for which it was ordained and established. Under our form of government, and the cardinal principles upon which it was founded, it should have been a peaceful remedy. The withdrawal of a State from a league has no revolutionary or insurrectionary characteristic. The government of the State remains unchanged as to all internal affairs. It is only its external or confederate relations that are altered. To term this action of a sovereign a "rebellion," is a gross abuse of

language. So is the flippant phrase which speaks of it as an appeal to the "arbitrament of the sword." In the late contest, in particular, there was no appeal by the seceding States to the arbitrament of arms. There was on their part no invitation nor provocation to war. They stood in an attitude of self-defense, and were attacked for merely exercising a right guaranteed by the original terms of the compact. *Davis on the Rise and Fall of the Confederate Government, Vol. I, 184.*

At an early period in the history of the Federal Government, the States of Kentucky and Virginia found reason to reassert this right of State interposition. In the first of the famous resolutions drawn by Mr. Jefferson in 1789, and with some modification adopted by the Legislature of Kentucky in November of that year, it is declared that, "whenever the General Government assumes undelegated powers, its acts are *unauthoritative, void, and of no force*; that to this compact each State acceded as a State, and is an internal party; that this Government, created by this compact, was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among parties having no common judge, *each party has an equal right to judge for itself, as well of infractions as of the mode and measures of redress.*"

In the Virginia resolutions, drawn by Mr. Madison, adopted on the 24th of December, 1798, and reaffirmed in 1799, the General Assembly of that State declares that "it views the powers of the Federal Government as resulting from the compact, to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact, as no further valid than they are authorized by the grants enumerated in that compact; and that, in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the States, who are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties, appertaining to them." Another of the same series of resolutions denounces the indications of a design "to consolidate the States by degrees into one sovereignty." *Davis on the Rise and Fall of the Confederate Government, Vol. I, 188-9.*

These famous resolutions became the platform and the creed of the Democratic party, then called the Republican, as distinguished from the Federalist:

They were the basis of the contest for the Presidency in 1800, which resulted in their approval by the people in the triumphant election of Mr. Jefferson. They became part of the accepted creed of the Republican, Democratic, State-Rights, or Conservative party, as it has been variously termed at different periods, and as such they were ratified, by the people in every Presidential election that took place for sixty years, with two exceptions. The last victory obtained under them, and when they were emphasized by adding the construction of them contained in the report of Mr. Madison to the Virginia Legislature in 1799, was at the election of Mr. Buchanan—the last President chosen by

vote of a party that could with any propriety be styled "national," in contradistinction to sectional. *Davis on the Rise and Fall of the Confederate Government, Vol. I, 189.*

Nullification is often confused with secession; they are, however, very different. Mr. Calhoun was the great advocate of nullification, and claimed Jefferson and Madison as his authority therefor, and the reading of the Kentucky and Virginia Resolutions which were drafted by them, seem to give color to the claim; but Mr. Madison, during the life and time of Calhoun, disclaimed that he or Jefferson, ever believed in or advocated nullification. Even Mr. Davis never believed in nullification, though he did in secession.

The doctrine is expressly repudiated by B. J. Sage in *The Republic of Republics*, 4th ed., p. 260: "But a State or its convention has no right to withdraw some, and leave the rest of the powers; or obstruct the execution of a part; or annul a law, which adhering to the Union; for the Constitution, being a compact, is not to be partly suspended and partly executed, by one of the parties." Jefferson Davis also said, in his farewell speech in the Senate (*The Rise and Fall of the Confederate Government, vol. i, pp. 221, 222*): "I hope none who hear me will confound this expression of mine with the advocacy of the right of a State to remain in the Union, and to disregard its constitutional obligations by the nullification of the law. Such is not my theory. Nullification and secession, so often confounded, are indeed antagonistic principles." And again, speaking of Judge Sharkey: "He had been an advocate of nullification—a doctrine to which I had never assented, and which had been at one time the main issue in Mississippi politics." (*Ibid.*, vol. i, p. 231.)

The arguments against the constitutionality of nullification may be found in Webster's Reply to Hayne, Jackson's Proclamation, and Dane's Abridgement, vol. ix, Appendix. *Foster on the Constitution, Vol. 1, (note) p. 142.*

Mr. Foster records the following incidents:

On April 13th, 1830, Jefferson's birthday was celebrated by a subscription dinner at Washington, with the President, Vice-President and Cabinet among the guests. The twenty-four regular toasts savored of the new doctrine of nullification. At their conclusion, Jackson was called upon for a volunteer, and gave utterance to his famous sentiment: "Our Federal Union; it must be preserved." The Vice-President, Calhoun, followed with another:

"The Union: next to our Liberty the most dear; may we all remember that it can only be preserved by respecting the rights of the States, and distributing equally the benefit and burthen of the Union."



The Secretary of State, Van Buren, then gave:

"Mutual forbearance and reciprocal concession: through their tendency the Union was established. The patriotic spirit from which they emanated will forever sustain it." *Foster on the Constitution, Vol. 1, pp. 147-8.*

Hayne resigned his seat in the Senate, where, in the opinion of his constituents, he had been the victor in his conflict with Webster, and sacrificed a brilliant political future, in order to lead as governor the proceedings for nullification. Calhoun resigned the Vice-Presidency, and was chosen Senator in the place of Hayne. October 28th, an act was passed calling a convention of the people of the State. *Foster on the Constitution, Vol. 1, p. 148.* ■

It was further ordained that:

It shall not be lawful for any of the constituted authorities, whether of this State or of the United States, to enforce the payment of duties imposed by the said acts within the limits of this State.

That it was the duty of the legislature "to adopt such measures and pass such acts as may be necessary to give full effect to this ordinance, and to prevent the enforcement and arrest the operation of the said acts and parts of acts of the Congress of the United States within the limits of this State, from and after the first day of February next." *Foster on the Constitution, Vol. 1, p. 149.*

Some curiosity was expressed upon Calhoun's return to the Senate as to whether he would take the oath to support the Constitution of the United States. He did this with perfect calmness and with entire consistency. For according to his theory of the Constitution, the proceedings in South Carolina were perfectly lawful. Jackson sent in a message reciting the proceedings, stating the sufficiency of the present statutes to deal with the subject, and asking for further powers. He also privately sent word to Calhoun that he would hang him higher than Haman if nullification were not abandoned. Calhoun's enemies said that he was cowed and driven to abandon his position. In truth, however, he continued his action with perfect coolness and came out the victor. Threats by words and action of a precipitation of an armed conflict between the State and the United States continued in South Carolina under the direction of Hayne during January, 1832. A reduction of the tariff as a compromise was adjusted after a conference between Calhoun and Clay. *Foster on the Constitution, Vol. 1, p. 154.*

On March 2d, 1833, the President signed the bill for the compromise tariff, and the enforcement bill.

March 11th, the Convention reassembled in South Carolina; repealed the Ordinance of Nullification on account of the passage of the new tariff; and on the 18th, went through the form of nullifying the enforcement act,—a perfectly safe proceeding, since obedience to the tariff prevented any test of its validity. A year later, the Supreme Court of South Carolina,

by a vote of two to one, held that the requirement of an oath of allegiance to the State ignoring the Constitution of the United States was a violation of the State Constitution, which forbade new qualifications for office. One of the judges held that it was also a violation of the Constitution of the United States.

Mr. Calhoun thus differentiates:

First, they are wholly dissimilar in their nature. *One has reference to the parties themselves, and the other to their agents.* Secession is a *withdrawal from the Union; a separation from partners,* and, as far as depends on the member withdrawing, a *dissolution of the partnership.* It presupposes an association; a union of several States or individuals for a common object. Wherever these exist, secession may; and where they do not, it can not. Nullification, on the contrary, *presupposes the relation of principal and agent:* the one granting a power to be executed, —the other, appointed by him with authority to execute it; *and is simply a declaration on the part of the principal, made in due form, that an act of the agent transcending his power is null and void.* It is a right belonging exclusively to the relation between principal and agent, to be found *wherever it exists, and in all its forms,* between several, or an association of principals, and their joint agents, as well as between a single principal and his agent. *6 Calhoun's Works, p. 168.*

Mr. Webster thus describes the evils of nullification:

Nullification, if successful, arrests the power of the law, absolves citizens from their duty, subverts the foundation both of protection and obedience, dispenses with oaths and obligations of allegiance, and elevates another authority to supreme command. Is not this revolution? And it raises to supreme command four-and-twenty distinct powers, each professing to be under a general government, and yet each setting its laws at defiance at pleasure. Is not this anarchy, as well as revolution? Sir, the Constitution of the United States was received as a whole, and for the whole country. If it can not stand altogether, it can not stand in parts; and if the laws can not be executed everywhere, they can not long be executed anywhere. *3 Webster's Works, (7th. ed.) p. 461.*

Mr. President, the alleged right of a State to decide constitutional questions for herself necessarily leads to force, because other States must have the same right, and because different States will decide differently; and when these questions arise between States, if there be no superior power, they can be decided only by the law of force. On entering into the Union, the people of each State gave up a part of their own power to make laws for themselves, in consideration that, as to common objects, they should have a part in making laws for other States. In other words, the people of all the States agreed to create a common government, to be conducted by common counsels, *3 Webster's Works, (7th. ed.), p. 462.*

Mr. Webster in reply to Mr. Calhoun's speech on the resolution declaring that the constitution was a mere compact, thus states his views as to its character and nature :

And now, Sir, against all these theories and opinions, I maintain,—

1. That the Constitution of the United States is not a league-confederacy, or compact between the people of the several States in their sovereign capacities; but a government proper founded on the adoption of the people, and creating direct relations between itself and individuals.

2. That no State authority has power to dissolve these relations; that nothing can dissolve them but revolution; and that, consequently, there can be no such thing as secession without revolution.

3. That there is a supreme law, consisting of the Constitution of the United States, and acts of Congress passed in pursuance of it, and treaties; and that, in cases not capable of assuming the character of a suit in law or equity, Congress must judge of, and finally interpret, this supreme law so often as it has occasion to pass acts of legislation; and in cases capable of assuming, and actually assuming, the character of a suit, the Supreme Court of the United States is the final interpreter.

4. That an attempt by a State to abrogate, annul, or nullify an act of Congress, or to arrest its operation within her limits, on the ground that, in her opinion, such law is unconstitutional, is a direct usurpation on the just powers of the general government, and on the equal rights of other States; a plain violation of the Constitution, and a proceeding essentially revolutionary in its character and tendency. 3 *Webster's Works*, (7th. ed.), pp. 464, 465.

The Constitution, Sir, is not a contract, but the result of a contract; meaning by contract no more than assent. Founded on consent, it is a government proper. Adopted by the agreement of the people of the United States, when adopted, it has become a Constitution. The people have agreed to make a Constitution; but when made, that Constitution becomes what its name imports. It is no longer a mere agreement. Our laws, Sir, have their foundation in the agreement or consent of the two houses of Congress. We say, habitually, that one house proposes a bill, and the other agrees to it; but the result of this agreement is not a compact, but a law. The law, the statute, is not the agreement, but something created by the agreement; and something which, when created, has a new character, and acts by its own authority. So the Constitution of the United States, founded in or on the consent of the people, may be said to rest on compact or consent; but it is not itself the compact, but its result. When the people agree to erect a government, and actually erect it, the thing is done, and the agreement is at an end. The compact is executed, and the end designed by it attained. Henceforth, the fruit of the agreement exists, but the agreement itself is merged in its own accomplishment; since there can be no longer a subsisting agreement or compact to form a constitution or government, after that constitution or government has been actually formed and established. 3 *Webster's Works*, (7th. ed.), p. 468.

The following were Mr. Clay's views of these questions :

With respect to this Union, Mr. President, the truth can not be too generally proclaimed, nor too strongly inculcated, that it is necessary

to the *whole* and to all the *parts*—necessary to those parts, indeed, in different degrees, but vitally necessary to *each*—and that threats to disturb or dissolve it, coming from any of the parts, would be quite as indiscreet and improper as would be threats from the residue to exclude those parts from the pale of its benefits. The great principle, which lies at the foundation of all free governments, is, that the majority must govern—from which there is, or can be, no appeal but to the sword. That majority ought to govern wisely, equitably, moderately, and constitutionally, but govern *it must*, subject only to that terrible appeal. If ever one of several states, being a minority, can, by menacing a dissolution of the Union, succeed in forcing an abandonment of great measures, deemed essential to the interests and prosperity of the whole, the Union, from that moment, is practically gone. It may linger on, in form and name, but its vital spirit has fled forever! Entertaining these deliberate opinions, I would entreat the patriotic people of South Carolina—the land of Marion, Sumter, and Pickens—of Rutledge, Laurens, the Pinckneys and Lowndes—of living and present names, which I would mention if they were not living or present—to pause, solemnly pause! and contemplate the frightful precipice which lies directly before them! To retreat may be painful and mortifying to their gallantry and pride, but it is to retreat to the Union, to safety, and to those brethren with whom, or with whose ancestors, they, or their ancestors, have won, on fields of glory, imperishable renown. To advance, is to rush on certain and inevitable disgrace and destruction.

2 *Clay*, pp. 215-216.

Mr. Madison thus wrote a friend :

I know not whence the idea could proceed that I concurred in the doctrine, that although a State could not nullify a law of the Union, it had a right to secede from the Union. Both spring from the same poisonous root, unless the right to secede be limited to cases of intolerable oppression, absolving the party from its constitutional obligations.

I hope that all who now see the absurdity of nullification, will see also the necessity of rejecting the claim to effect it through the State judiciaries, which can only be kept in their constitutional career by the control of the Federal jurisdiction. Take the linch-pins from a carriage, and how soon would a wheel be off its axle; an emblem of the speedy fate of the Federal system, were the parties to it loosened from the authority which confines them to their spheres. 4 *Writings of Madison*, p. 196.

Mr. Madison thus spoke of nullification :

I have made no secret of my surprise and sorrow at the proceedings in South Carolina, which are understood to assert a right to annul the acts of Congress within the State, and even to secede from the Union itself. But I am willing to enter the political field with the "*telum imbellè*" which alone I could wield. The task of combating such unhappy aberrations belongs to other hands. A man whose years have but reached the canonical three-score-and-ten (and mine are much beyond the number) should distrust himself, whether distrusted by his friends or not, and should never forget that his arguments, whatever they may be, will be answered by allusions to the date of his birth.

4 *Writings of Madison*, pp. 65-6.



Mr. Webster, in his debate with Mr. Hayne, thus states the reasons against the power of a State to nullify an act of Congress:

If the Constitution be a compact between States, still that Constitution, or that compact, has established a government, with certain powers; and whether it be one of those powers, that it shall construe and interpret for itself the terms of the compact, in doubtful cases, is a question which can only be decided by looking to the compact, and inquiring what provisions it contains on this point. Without any inconsistency with natural reason, the government even thus created might be trusted with this power of construction. The extent of its powers, therefore, must still be sought for in the instrument itself. *3 Webster's Works, (7th. ed.), p. 344.*

The Constitution declares, that *the laws of Congress passed in pursuance of the Constitution shall be the supreme law of the land.* No construction is necessary here. It declares, also, with equal plainness and precision, *that the judicial power of the United States shall extend to every case arising under the laws of Congress.* This needs no construction. Here is a law, then, which is declared to be supreme; and here is a power established, which is to interpret that law. Now, Sir, how has the gentleman met this? Suppose the Constitution to be a compact, yet here are its terms; and how does the gentleman get rid of them? He can not argue the *scal off the bond*, nor the words out of the instrument. Here they are; what answer does he give to them? None in the world, Sir, except, that the effect of this would be to place the States in a condition of inferiority; and that it results from the very nature of things, there being no superior, that the parties must be their own judges! Thus closely and cogently does the honorable gentleman reason on the words of the Constitution. The gentleman says, if there be such a power of final decision in the general government, he asks for the grant of that power. Well, Sir, I show him the grant. I turn him to the very words. I show him that the laws of Congress are made supreme; and that the judicial power extends, by express words, to the interpretation of these laws. Instead of answering this, he retreats into the general reflection, that it must result *from the nature of things*, that the States, being parties, must judge for themselves. *3 Webster's Works, (7th. ed.), p. 345.*

In 1833 Mr. Madison wrote Mr. Webster, thanking him for a copy of his speech in the debate with Mr. Hayne on the Foote Resolution. In part he said:

I return my thanks for the copy of your late very powerful speech in the Senate of the United States. It crushes "nullification" and must hasten an abandonment of "secession." But this dodges the blow, by confounding the claim to secede at will with the right of seceding from intolerable oppression. The former answers itself, being a violation without cause of a faith solemnly pledged. The latter is another name only for revolution, about which there is no theoretic controversy. *Webster's Works, (7th ed.), Vol. 1, cvii.*

### Impracticability of Secession

The compiler of this book endorses the sentiment of Mr. Davis in the last sentence of his book, "The Rise and Fall of The Confederate Government," where he says:

In asserting the right of secession, it has not been my wish to incite to its exercise: I recognize the fact that the war showed it to be impracticable, but this did not prove it to be wrong; and, now that it may not be again attempted, and that the Union may promote the general welfare, it is needful that the truth, the whole truth, should be known, so that crimination and recrimination may forever cease, and then, on the basis of fraternity and faithful regard for the rights of the States, there may be written on the arch of the Union, *Esto perpetua*. *Davis on The Rise and Fall of The Confederate Government, Vol. II. 764.*

### Origin of the Doctrine of Secession

Mr. Davis thus gives the history of the doctrine:

Colonel Timothy Pickering, who had been an officer of the war of the Revolution, afterward successively Postmaster-General, Secretary of War, and Secretary of State, in the Cabinet of General Washington, and, still later, long a representative of the State of Massachusetts in the Senate of the United States, was one of the leading secessionists of his day. Writing from Washington to a friend, on the 24th of December, 1803, he says:

"I will not yet despair. I will rather anticipate *a new confederacy*, exempt from the corrupt and corrupting influence and oppression of the aristocratic democrats of the South. There will be (and our children, at farthest, will see it) a separation. The white and black population will mark the boundary."

In another letter, written a few weeks afterward (January 29, 1804), speaking of what he regarded as wrongs and abuses perpetrated by the existing Administration, he thus expresses his views of the remedy to be applied:

"The principles of our Revolution point to the remedy—*a separation*. That this can be accomplished, and without spilling one drop of blood, I have little doubt. . . .

"I do not believe in the practicability of a long-continued Union. A *Northern Confederacy* would unite congenial characters and present a fairer prospect of public happiness; while the Southern States, having a similarity of habits, might be left to 'manage their own affairs in their own way.' If a separation were to take place, our mutual wants would render a friendly and commercial intercourse inevitable. The Southern States would require the naval protection of the *Northern Union*, and the products of the former would be important to the navigation and commerce of the latter. . . .

"It (the separation) must begin in Massachusetts. The proposition would be welcomed in Connecticut; and could we doubt of New Hampshire? But New York must be associated; and how is her concurrence to be obtained? She must be made the center of the Con-

federacy. Vermont and New Jersey would follow of course, and Rhode Island of necessity." *Davis on The Rise and Fall of The Confederate Government, Vol. I, 72.*

In 1811, on the bill for the admission of Louisiana as a State of the Union, the Hon. Josiah Quincy, a member of Congress from Massachusetts, said:

"If this bill passes, it is my deliberate opinion that it is virtually a dissolution of this Union; that it will free the States from their moral obligation; and as it will be the right of all, so it will be the duty of some, definitely to prepare for a separation—amicably if they can, violently if they must."

Mr. Poindexter, delegate from what was then the Mississippi Territory, took exception to these expressions of Mr. Quincy, and called him to order. The Speaker (Mr. Varnum, of Massachusetts) sustained Mr. Poindexter, and decided that the suggestion of a dissolution of the Union was out of order. An appeal was taken from this decision, and it was reversed. Mr. Quincy proceeded to vindicate the propriety of his position in a speech of some length, in the course of which he said:

"Is there a principle of public law better settled or more conformable to the plainest suggestions of reason than that the violation of a contract by one of the parties may be considered as exempting the other from its obligations? Suppose, in private life, thirteen form a partnership, and ten of them undertake to admit a new partner without the concurrence of the other three; would it not be at their option to abandon the partnership after so palpable an infringement of their rights? How much more in the political partnership, where the admission of new associates, without previous authority, is so pregnant with obvious dangers and evils!" *Davis on The Rise and Fall of The Confederate Government, Vol. I, 73, 74.*

The celebrated Hartford Convention assembled in December, 1814. It consisted of delegates chosen by the Legislatures of Massachusetts, Rhode Island, and Connecticut, with an irregular or imperfect representation from the other two New England States, New Hampshire and Vermont, convened for the purpose of considering the grievances complained of by those States in connection with the war with Great Britain. They sat with closed doors, and the character of their deliberations and discussions has not been authentically disclosed. It was generally understood, however, that the chief subject of their consideration was the question of the withdrawal of the States they represented from the Union. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 74.*

Again, in 1844-'45, the measures taken for the annexation of Texas evoked remonstrances, accompanied by threats of a dissolution of the Union from the Northeastern States. The Legislature of Massachusetts, in 1844, adopted a resolution, declaring, in behalf of that State, that "the Commonwealth of Massachusetts, faithful to the compact between the people of the United States, according to the plain meaning and intent in which it was understood by them, is but that it is determined, as it doubts not the other States are, sincerely anxious for its preservation; to submit to undelegated powers

*in no body of men on earth;”* and that “the project of the annexation of Texas, unless arrested on the threshold, *may tend to drive these States into a dissolution of the Union.*”

Early in the next year (February 11, 1845), the same Legislature adopted and communicated to Congress a series of resolutions on the same subject, in one of which it was declared that, “as the powers of legislation granted in the Constitution of the United States to Congress do not embrace a case of the admission of a foreign state or foreign territory, by legislation, into the Union, such an act of admission would have *no binding force whatever on the people of Massachusetts*”—language which must have meant that the admission of Texas would be a justifiable ground for secession, unless it was intended to announce the purpose of nullification. *Davis on the Rise and Fall of the Confederate Government, Vol. I, 76.*

The right of a State to secede from the Union was not as is by some supposed and charged, a new doctrine, first announced by the South and her statesmen, as a means of perpetuating slavery. This right was claimed by many statesmen, East, North and South, long before the differences between advocates as to the question of slavery in the 50s and 60s. It was taught by eminent publicists and text writers on the Constitution. See Tucker’s *Blackstone, Vol. II, appendix, pp. 170, 171, 175, 187.* Rawles on Constitution, pp. 288, 290. Even Henry Cabot Lodge, in his life of Webster, states that in the early history of the Constitution, both Federalists and Republicans, from Washington and Hamilton on the one side to Clinton and Jefferson on the other, conceded that any State had a right to peaceably withdraw from the Union. See his *Work, pp. 176, 177.* The State of Massachusetts, and her statesmen, as well as Southern States, and theirs, when Congress refused to make appropriations to carry the Jay Treaty into effect; when Louisiana was acquired; again when the United States invaded Canada, and when Texas was acquired, some of the Northern and Eastern States threatened and asserted the rights of the States to secede. If the Southern States had not divided among themselves, as to Candidates in 1860, and had succeeded in electing a President, and a majority of Congress, it very probably would have resulted that some of the Northern States would have seceded. It was perfectly evident, that secession would follow this election.

Mr. Foster thus speaks of the subject and conditions:

The election by the Northern States, for President, of a Northern man who had said that the Union could not “endure permanently half slave, half free,” and had publicly declared his refusal to ac-



quiesce in the opinion in the Dred Scott Case, that slavery could not be constitutionally excluded from the Territories, convinced the South that new safeguards were necessary for the preservation of their peculiar institution. Renewed threats of a dissolution of the Union were received in such a manner by the North as to make it clear that a majority of the people were resolved to submit to no further aggressions by the slave power. *Foster on the Constitution, Vol. I, p. 163.*

Alexander H. Stephens, the Vice-President of the Confederacy, says, in his *Constitutional View of the War Between the States, Vol. 11, p. 321* :

The truth is, in my judgment, the wavering scale in Georgia was turned by a sentiment, the key-note to which was given in the words, "We can make better terms out of the Union than in it." It was Mr. Thomas R. R. Cobb who gave utterance to this key-note, in his speech before the Legislature two days before my address before the same body. This one idea did more, in my opinion, in carrying the State out, than all the arguments and eloquence of all the others combined. Two-thirds, at least, of those who voted for the Ordinance of Secession, did so, I have but little doubt, with a view to a more certain Re-formation of the Union.

And again speaking of Lincoln's proclamation, calling for troops Mr. Foster further said :

"The effect of this upon the public mind of the Southern States cannot be described or even estimated. The shock was not unlike that produced by great convulsions of nature . . . the upheavings and rockings of the earth itself! It was not that of fright. Far from it! But a profound feeling of wonder and astonishment! *Up to this time, a majority, I think, of even those who had favored the policy of secession, had done so under the belief and conviction that it was the surest way of securing a redress of grievances, and of bringing the Federal Government back to constitutional principles.* Many of them indulged hopes that a Re-formation, or a Re-construction of the Union would soon take place on the basis of the new Montgomery Constitution, and that the Union, under this, would be continued and strengthened, or made more perfect, as it had been in 1789, after the withdrawal of nine States from the first Union, and the adoption of the Constitution of 1787. This proclamation dispelled all such hopes." He says again that when South Carolina attacked Fort Sumter, Lincoln should have called a Congress of the States which had not seceded, to consult them upon his action in the matter. *Foster on the Constitution, Vol. I, (note) p. 170.*

Stephens gives the following testimony concerning the attitude of Jefferson Davis: "I never saw a word from him recommending secession as the proper remedy against threatened dangers until he joined in the general letter of the Southern Senators and Representatives in Congress to their States

advising them to take that course. This was in December, 1860, and not until after it was ascertained in the Committee of the Senate, on Mr. Crittenden's proposition for quieting the apprehensions and alarm of the Southern States, from the accession of Mr. Lincoln to power, that the Republicans, his supporters, would not agree to that measure. It is well known that both he and Mr. Toombs declared their willingness to accept the adoption of Mr. Crittenden's measure as a final settlement of the controversy between the States and sections, if the party coming into power would agree to it in the same spirit and with the same assurance." (Ibid., vol. i, pp. 416, 417.) See also Douglas' speech in the Senate, Jan. 3d, 1861, stating the position of Toombs and Davis at that time. (Cong. Globe, 2d Sess., 36th Congress, appendix, p. 441); Report by H. P. Bell, commissioner of Georgia to Tennessee (Journal of Georgia's Convention, p. 368); article by J. D. Cox in Atlantic Monthly for 1892, p. 390; infra, note 56.

Foster refers to the following authorities on the subject:

The evidence collected by Rhodes in his History of the United States, vol. iii, pp. 272-280, 381-385, 404-408 (see also Stephens, Constitutional View of the War between the States, vol. ii, p. 389), proves conclusively that after the movement was under way, the people of the South went faster than their leaders wished. Jefferson Davis urged them to go more slowly, and said in private conference and by letters and telegrams that he was "opposed to secession as long as the hope of a peaceful remedy remained." (Letter of O. R. Singleton, quoted by Davis, Rise and Fall of the Confederate Government, vol. i, p. 58; see also *ibid.*, pp. 201, 227; Life of Davis, by his wife, vol. i, p. 697). Even Toombs was accused by his constituents of brandishing a tin sword (see citations by Rhodes, *ibid.*, vol. iii, p. 213). The evidence cited, as well as all the contemporary reports, prove that had the Crittenden compromise been adopted, secession would have been abandoned. *Foster on the Constitution, Vol. I. (note) p. 177-8.*

### **Secession An Honest Belief**

A Northern man's view of the subject:

"There is no foundation for the approbrium heaped upon the Confederates by the supporters of the Union during the Civil War and the subsequent period of Reconstruction. Nothing is more unjust than to charge with perjury men who, like Davis, Lee and Stephens, after having sworn to support the Constitution, some of them after opposition to secession, joined their fellow citizens in their own States in waging war upon the national government. They honestly believed that the Constitution justified such action. They were supported by doctrines laid down by publicists as well as statesmen of authority in the North as well as the South. During the whole of the nineteenth century down to the surrender of Lee, the country was

divided in opinion upon the subject. The Civil War, although held in law to be a rebellion, was treated by the Federal army, by the Federal courts, and by foreign nations as a fact in geographical war, giving to the combatants on both sides and the inhabitants of each section of the country the rights and liabilities of belligerents. Members of the Confederate army were not punished as rebels. None of them were tried for treason. A Northern jury refused to convict of piracy officers of Confederate privateers. No attempt was made to draw an indictment against the whole Southern people." *Foster on the Constitution, Vol. I, pp. 111-115.*

Mr. Foster thus concludes as to the result of secession:

The South failed in an attempt to accomplish a revolution for the security of slavery. Their failure was followed by a successful revolution effected by the North, which destroyed the institution that had been the canker in the body politic, and so cemented the Union as to make it stronger and more beneficial than before. At the start of secession, the Southern statesmen announced that they would never return without a reconstruction of the Union. On their return, they found that a reconstruction had been brought to pass. And their children now admit that what they obtained was better than what they sought. *Foster on the Constitution, Vol. I, p. 268.*

Mr. Webster, as Secretary of State, wrote his own people:

We have recently been informed, gentlemen, of an open act of resistance to law, in the city of Boston; and if the accounts be correct of the circumstances of this occurrence, it is, strictly speaking, a case of treason. If men combine and confederate together, and by force of arms or force of numbers effectually resist the operation of an act of Congress, in its application to a particular individual, with the avowed purpose of making the same resistance to the same act in its application to all other individuals, this is levying war against the United States, and is nothing less than treason. Now, I understand that the persons concerned in this outrage in Boston avow openly their full purpose of preventing, by arms, or by the power of the multitude, the execution of process for the arrest of an alleged fugitive slave in any and all cases whatever, I am sure, gentlemen, that shame will burn the cheeks, and indignation fill the hearts of nineteen-twentieths of the people of Boston, at the avowal of principles and the commission of outrages so abominable. Depend upon it, that, if the people of that city had been informed of any such purpose or design as was carried into effect in the court-house in Boston, on Saturday last, they would have rushed to the spot, and crushed such a nefarious project into the dust.<sup>1</sup> *6 Webster's Works, (7th ed.), p. 589.*

<sup>1</sup>There were many acts in the Northern and Eastern States similar to the ones denounced and condemned above by Mr. Webster. It was nothing less than nullification of the Federal Constitution and statutes as to fugitive

slaves by mob law. Mr. Webster misjudged the feelings and sentiments of the multitude in the Northern States. This mob was voicing the public sentiment which ultimately controlled the Federal Constitution.

**The Right of Secession—Authorities For**

Mr. Bryce in his work on the American Constitution, after stating that the Constitution prior to the Thirteenth Amendment not only authorized but protected slavery, says on the subject:

Stripped of legal technicalities, the dispute resolved itself into the problem often proposed but capable of no general solution: When is a majority entitled to use force for the sake of retaining a minority in the same political body with itself? To this question, when it appears in a concrete shape, as to the similar question, when an insurrection is justifiable, an answer can seldom be given beforehand. The result decides. When treason prospers, none dare to call it treason.

The Constitution, which had rendered many services to the American people, did them inevitable dis-service when it fixed their minds on the legal aspects of the question. Law was meant to be the servant of politics, and must not be suffered to become the master.<sup>1</sup> A case had arisen which its formulæ were unfit to deal with, a case which had to be settled on large moral and historical grounds. It was not merely the superior physical force of the North that prevailed; it was the moral forces which rule the world, forces which had long worked against slavery, and were ordained to save North America from the curse of hostile nations established side by side. *Bryce's American Commonwealth, Vol. I, §10.*

In the uncertainty as to where legal right resided, it would have been prudent to consider where physical force resided. The South however thought herself able to resist any physical force which the rest of the nation might bring against her. Thus encouraged, she took her stand on the doctrine of States Rights; and then followed a pouring out of blood and treasure such as was never spent on determining a law before, not even when Edward III and successors waged war for a hundred years to establish the claim of females to inherit the crown of France.

What then, do the rights of a State now include? Every power or right of a Government except:

The right of secession (not abrogated in terms, but admitted since the war to be no longer claimable. It is expressly negated in the recent Constitutions of several Southern States.)

Powers which the Constitution withholds from the State (including that of intercourse with foreign governments.)

Powers which the Constitution expressly confers on the Federal Government.

As respects some powers of the last class, however, the States may

<sup>1</sup>Here Mr. Bryce spoke a great truth when he said that law is the servant of politics, and not its master. Politics in the Northern States had decided not to observe this provision of the Constitution as to slavery. The officers of the government did profess to defend and did not intend to vio-

late the Constitution because they had to take an oath to support it, this provision as well as others. But, as Mr. Madison said, public opinion is the only real sovereign in a free government, and as Mr. Bryce says: Politics is the master, and law the servant.



act concurrently with, or in default or action by, the Federal Government. It is only from contravention of its action that they must abstain. *Bryce's American Commonwealth*, Vol. I, 411.

Mr. Davis thus collects historical facts as to the right of secession :

The evidence of Hamilton and Madison—two of the most eminent of the authors of the Constitution, and the two preeminent contemporary expounders of its meaning—is the most valuable that could be offered for its interpretation. That of all the other statesmen of the period only tends to confirm the same conclusions. The illustrious WASHINGTON, who presided over the Philadelphia Convention, in his correspondence, repeatedly refers to the proposed Union as a "Confederacy" of States, or a "Confederated Government," and to the several States as "acceding," or signifying their consent or "accession" to it, in ratifying the Constitution. He refers to the Constitution itself as "a compact or treaty," and classifies it among compacts or treaties between "men, bodies of men, or countries." Writing to Count Rochambeau, on January 8, 1788, he says that the proposed Constitution "is to be submitted to conventions chosen by *the people of the several States*, and by them approved or rejected"—showing what *he* understood by "the people of the United States," who were to ordain and establish it. These same people—that is, "the people of the several States"—he says, in a letter to Lafayette, April 28, 1788, "retain everything they do not, by express terms, give up." In a letter written to Benjamin Lincoln, October 26, 1788, he refers to the expectation that North Carolina will accede to the Union, and adds, "Whoever shall be found to enjoy the confidence of *the States* so far as to be elected Vice-President," etc.—showing that in the "Confederate Government," as he termed it, the States were still to act independently, even in the election of officers of the General Government. He wrote to General Knox, June 17, 1788, "I can not but hope that the States which may be disposed to make a secession will think often and seriously on the consequences." June 28, 1788, he wrote to General Pinckney that New Hampshire "had acceded to the new Confederacy," and, in reference to North Carolina, "I should be astonished if that State should withdraw from the Union." *Davis on The Rise and Fall of The Confederate Government*, Vol. I, 165.

John Marshall, afterward the most distinguished Chief Justice of the United States—who has certainly never been regarded as holding high views of State rights—in the Virginia Convention of 1788, is reported to have said:

"The State governments did not derive their powers from the general Government; but each government derived its powers from the people, and each was to get according to the powers given it. Would any gentleman deny this? . . . Could any man say that this power was not retained by the States, as they had not given it away? For (says he) does not a power remain till it is given away? The State Legislatures had power to command and govern their militia before, and have it still, undeniably, unless there be something in this Constitution that takes it away. . . ."

He concluded by observing that the power of governing the militia was not vested in the States by implication, because, being possessed of it antecedently to the adoption of the Government, and not being divested of it by any grant or restriction in the Constitution, they must necessarily be as fully possessed of it as ever they had been, and it could not be said that the States derived any powers from that system, but retained them, though not acknowledged in any part of it. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 165.*

At an earlier period—but when he had already served for several years in Congress, and had attained the full maturity of his powers—Mr. Webster held the views which were presented in a memorial to Congress of citizens of Boston, December 15, 1819, relative to the admission of Missouri, drawn up and signed by a committee of which he was chairman, and which also included among its members Mr. Josiah Quincy. He speaks of the States as enjoying “the exclusive possession of sovereignty” over their own territory, calls the United States “the American Confederacy,” and says, “The only parties to the Constitution, contemplated by it originally, were the thirteen confederated States.” And again, “As between the original States, the representation rests on compact and plighted faith; and your memorialists have no wish that that compact should be disturbed or that plighted faith in the slightest degree violated.” *Davis on The Rise and Fall of The Confederate Government, Vol. I, 166.*

Mr. Webster, in a speech in Virginia in 1851, said:

“If the South were to violate any part of the Constitution intentionally and systematically, and persist in so doing year after year, and no remedy could be had, would the North be any longer bound by the rest of it? And if the North were, deliberately, habitually, and of fixed purpose, to disregard one part of it, would the South be bound any longer to observe its other obligations? . . .

“How absurd it is to suppose that, when different parties enter into a compact for certain purposes, either can disregard any one provision, and expect, nevertheless, the other to observe the rest! . . .

“I have not hesitated to say, and I repeat, that, if the Northern States refuse, willfully and deliberately, to carry into effect that part of the Constitution which respects the restoration of fugitive slaves, and Congress provides no remedy, the South would no longer be bound to observe the compact. A bargain can not be broken on one side, and still bind the other side.”

Entirely in accord with these truths are the arguments of Mr. Madison, in the “Federalist,” to show that the great principles of the Constitution are substantially the same as those of the Articles of Confederation. He says:

“I ask, What are these principles? Do they require that, in the establishment of the Constitution, the States should be regarded as distinct and independent sovereigns? They are so regarded by the Constitution proposed. . . . Do these principles, in fine, require that the powers of the General Government should be limited, and

that, beyond this limit, the States should be left in possession of their sovereignty and independence? We have seen that, in the new Government as in the old, the general powers are limited; and that the States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction.

The truth is, that the great principles of the Constitution proposed by the Convention may be considered *less absolutely new, than as the expansion of principles which are found in the Articles of Confederation.*"

Mr. Everett says:

The States are not named in it; the word sovereignty does not occur in it; the right of secession is as much ignored in it as the procession of the equinoxes. We have seen how very untenable is the assertion that the States are not named in it, and how much pertinency or significance in the omission of the *word* sovereignty. The pertinent question that occurs is, why was so obvious an attribute of sovereignty not expressly renounced if it was intended to surrender it? It certainly existed; it was not surrendered; therefore it still exists. This would be a more national and rational conclusion than that it has ceased to exist because it is not mentioned.

The simple truth is, that it would have been a very extraordinary thing to incorporate into the Constitution any express provision for the secession of the States and dissolution of the Union. Its founders undoubtedly desired and hoped that it would be perpetual; against the proposition for power to coerce a State, the argument was that it would be a means, not of preserving, but of destroying, the Union.

Mr. Davis, in *The Rise and Fall of The Confederate Government*, Vol. I, p. 178, says:

The ratification of the Constitution by Virginia has already been quoted, in which the people of that State, through their Convention, did expressly "declare, and make known that the powers granted under the Constitution, being derived from the people of the United States, *may be resumed by them*, whensoever the same shall be perverted to their injury or oppression, and that every power not granted thereby remains with them and at their will."

New York and Rhode Island were no less explicit, both declaring that "the powers of government *may be reassumed by the people* whenever it shall become necessary to their happiness."

These expressions are not mere *obiter dicta*, thrown out incidentally, and entitled only to be regarded as an expression of opinion by their authors.

In the language of the Declaration of Independence, "All experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." Would not real grievances be rendered more tolerable by the consciousness of power to remove them; and would not even imaginary wrongs be embittered by the manifestation of a purpose to make them perpetual? To ask these questions is to answer them.

The wise and brave men who had, at much peril and great sacrifice, secured the independence of the States, were as little disposed to surrender the sovereignty of the State as they were anxious to remedy the defects of the Confederation. The Union they formed was not to destroy the States, but to "secure the blessings of liberty to ourselves and our posterity." *Davis on The Rise and Fall of The Confederate Government, Vol. I, 176.*

Edmund Randolph, Governor of Virginia, although the mover of the original proposition to authorize the employment of the forces of the Union against a delinquent member, which had been so signally defeated in the Federal Convention, afterward in the Virginia Convention, made an eloquent protest against the idea of the employment of force against the State. " 'What species of military coercion,' could the General Government adopt for the enforcement of obedience to its demands? Either an army sent into the heart of a delinquent State, or blocking up its ports. Have we lived to this, then, that, in order to suppress and exclude tyranny, it is necessary to render the most affectionate friends the most bitter enemies, set the father against the son, and make the brother slay the brother? Is this the happy expedient that is to preserve liberty? Will it not destroy it? If any army be once introduced to force us, if once marched into Virginia, figure to yourselves what the dreadful consequence will be; the most lamentable civil war must ensue."

We have seen already how vehemently the idea of *judicial* coercion was repudiated by Hamilton, Marshall, and others. The suggestion of *military* coercion was uniformly treated, as in the above extracts, with still more abhorrence. No principle was more fully and firmly settled on the highest authority than that, under our system, there could be no coercion of a State. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 178-9.*

The Boston memorial to Congress as prepared by a Committee with Mr. Webster at its head, said that the new States "are universally considered as admitted into the Union upon the same footing as the original States, and as possessing, in respect to the Union, the same rights of *sovereignty, freedom, and independence, as the other States.*"

But, with regard to States formed of territory acquired by purchase from France, Spain, and Mexico, it is claimed that, as they were bought by the United States, they belong to the same, and have no right to withdraw at will from an association the property which had been purchased by the other parties.

Happy would it have been if the equal rights of the people of *all* the States to the enjoyment of territory acquired by the common treasure could have been recognized at the proper time! There would then have been no secession and no war. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 181.*

The treaty by which the Louisiana territory was ceded to the United States expressly provided that the inhabitants thereof should be "admitted, as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States." In all other ac-



quisitions of territory the same stipulation is either expressed or implied. Indeed, the denial of the right would be inconsistent with the character of American political institutions. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 181-2.*

Mr. Davis, the president of the seceding States, thus states his own views as to the right of a State to secede from the Union:

The right of a State to secede from the Union—that is, to withdraw the powers it had granted by virtue of a sovereignty which it had never delegated—was a right never disputed by the generation that established the Constitution. *Davis on the History of the Confederate States, 50.*

The present Union owes its very existence to the dissolution, by separate secession, of its members, from the former Union, which, in its organic principles, rested upon precisely the same foundation. *Davis on the History of the Confederate States, 50.*

The alternative to secession is coercion. That is to say, if no right of secession exists—if it is forbidden by the Constitution or hostile to it—then it is a wrong for which a remedy must lawfully be provided; which, in such case, could only be the use of force against the State attempting to withdraw. *Davis on the History of the Confederate States, 51.*

A little consideration of these plain and irrefutable truths will show how utterly unworthy and false are the vulgar taunts which attribute "treason" to those who, in the late secession of the Southern States, were loyal to the only sovereign entitled to their allegiance; and which still more absurdly prate of the violation of oaths to support "the Government," an oath which no citizen could have been lawfully required to take, and which must have been ignorantly confounded with the prescribed oath to support the Constitution. *Davis on the History of the Confederate States, 52.*

"*Salus republicae lex suprema.*" Above that supreme written law stands the safety of the Commonwealth, which will be secured, if possible in conformity with the Constitution; but if that be not possible, then by evading it, or even overriding the Constitution. This is what happened in the Civil War, when men said that they would break the Constitution in order to preserve it. *Bryce's American Commonwealth, Vol. I, 387-8.*

This was Lincoln's position; on this theory, he waged the war:

In a remarkable letter written to Mr. Hodges (4th April, 1864), President Lincoln said: "My oath to preserve the Constitution imposed on me the duty of preserving by every indispensable means that government, the nation, of which the Constitution is the organic law. Was it possible to lose the nation and yet to preserve the Constitution? By general law, life and limb must be protected, yet often a limb must be amputated to save a life, but a life is never wisely given

to save a limb. I felt that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation. Right or wrong I assumed this ground, and now avow it. I could not feel that to the best of my ability I had even tried to preserve the Constitution, if, to save slavery, or any minor matter, I should permit the wreck of government, country, and Constitution altogether." *Bryce's American Commonwealth, Vol. I, 388, note.*

Mr. Madison thus speaks of the right :

Secession presents a question more particularly between the States themselves, as parties to the constitutional compact; and the great argument for it is derived from the sovereignty of the parties; as if the more complete the authority to enter into a compact, the less was the obligation to abide by it. It is but fair to observe, that those who assert the right present it in forms essentially different; some as a right always existing, and to be used at pleasure; others as a right created by extreme cases requiring it. The latter class are wrong only in using terms which confound them with the former.

Of late, attempts are observed to shelter the heresy of secession under the case of expatriation, from which it essentially differs. The expatriating party removes only his person and his movable property, and does not incommode those whom he leaves. A seceding State nullifies the domain, and disturbs the whole system from which it separates itself. Pushed to the extent in which the right is sometimes asserted, it might break into fragments every single community. *4 Writings of Madison, pp. 269-270.*

While Mr. Madison was opposed to both nullification and secession, he like Jefferson and Webster, admitted there was a limit beyond which submission to misrule was not a virtue. Mr. Madison says:

It is true that, in extreme cases of oppression justifying a resort to original rights, and in which passive obedience and non-resistance cease to be obligatory under any Government, a single State or any part of a State might rightfully cast off the yoke. What would be the condition of the Union, and the other members of it, if a single member could at will renounce its connection, and erect itself, in the midst of them, into an independent and foreign power; its geographical relations remaining the same, and all the social and political relations, with the others, converted into those of aliens and rivals, not to say enemies, pursuing separate and conflicting interests? *4 Writings of Madison, p. 225.*

The essential difference between a free government and governments not free, is, that the former is founded in compact, the parties to which are mutually and equally bound by it. Neither of them, therefore, can have a greater right to break off from the bargain, than the other or others have to hold them to it. And certainly there is noth-

<sup>1</sup>It seems, as Mr. Bryce says, it was necessary to evade or violate parts of the Constitution to save the remainder

of it and the union. Public opinion was the sovereign and the master, not the written law.

ing in the Virginia resolutions of 1789 adverse to this principle, which is that of common sense and common justice. The fallacy which draws a different conclusion lies in confounding a *single* party with the *parties* to the constitutional compact of the United States. The latter having made the compact, may do what they will with it. The former, as one only of the parties, owes fidelity to it till released by consent, or absolved by an intolerable abuse of the power created.<sup>1</sup> *4 Writings of Madison, p. 228.*

Mr. Calhoun, addressing the Senate with all the earnestness of his nature, and with that sincere desire to avert the danger of disunion which those who knew him best never doubted, had asked the emphatic question, "How can the Union be saved?" He answered his question thus:

"There is but one way by which it can be saved with any certainty; and that is by a full and final settlement, on the principles of justice, of all the questions at issue between the sections. The South asks for justice—simple justice—and less she ought not to take. She has no compromise to offer but the Constitution, and no concession or surrender to make. . . .

"Can this be done? Yes, easily! Not by the weaker party; for it can of itself do nothing—not even protect itself—but by the stronger. . . . But will the North agree to do this? It is for her to answer this question. But, I will say, she can not refuse if she has half the love of the Union which she professes to have, nor without exposing herself to the charge that her love of power and aggrandizement is far greater than her love of the Union."

When the Alien and Sedition Laws were passed in 1798, during Adams' administration, a number of States declared the right to withdraw, or to nullify the statutes claimed by the States to be unconstitutional. See the Virginia and Kentucky Resolutions drafted by Madison and Jefferson. A valuable summary of the authorities on this subject may be found in Foster on the Constitution, Vol. 1, pp. 110-150.

In 1811, during the debate on the bill for the admission of Louisiana as a State, Josiah Quincy, a member from Massachusetts, said in the House of Representatives:

"It is my deliberate opinion that if this bill passes the bonds of this Union are virtually dissolved; that the States which compose it are free from their moral obligation and

<sup>1</sup>This was the doctrine asserted by the Southern States. Public opinion in the Northern States had declined

to be bound by the Constitution, and the Southern States claimed that they were thereby absolved from it.

that, as it will be the right of all, so it will be the duty of some, definitely to prepare for separation, amicably if they can, violently if they must."

The Speaker, Joseph B. Varnum of the same State, held that the language was disorderly, but the House by a vote of fifty-six to fifty-three reversed the ruling.

In 1844, the legislature of Massachusetts passed a series of resolutions upon the annexation of Texas, containing the threat, "That the project of the annexation of Texas, unless arrested on the threshold, may drive these States into a dissolution of the Union."

On the same subject, February 22d, 1845, the same body adopted another series of resolutions, which included the statement that,

"As the powers of legislation granted in the Constitution of the United States to Congress, do not embrace the case of the admission of a foreign state, or foreign territory, by Legislation, into the Union, such an act of admission would have no binding force whatever on the people of Massachusetts."

The President of the Confederate States, Jefferson Davis, among other things gives the following reasons to sustain the right of any State to secede from the Union.

The British Colonies of North America—subsequently the United States—had a common allegiance to the British Crown. Otherwise they were as distinct from one another as they were from Canada, Nova Scotia, and the American islands owned by Great Britain. When, by the violation of both charter and inalienable rights, for which neither redress nor security against repetition could be obtained, some of the colonies decided to sever their connection with the British Crown, they formed an alliance, declared themselves free and independent States, and, with their united strength, made such vigorous resistance to the efforts of the Mother Country to reduce them to subjection that, finally, a Treaty of Peace was made, in September, 1783, in the following words:

"Article I. His Britanic Majesty acknowledges the said United States, viz.: New Hampshire, Massachusetts Bay, Rhode Island, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign, and independent States; that he treats with them as such." *Davis on the History of the Confederate States*, pp. 1-2.

The States, now recognized as free and independent, had, in November, 1777, agreed upon "Articles of Federation and Perpetual Union," which were referred to the Legislatures of the several States, and, being duly approved, were adopted by the Congress on the 9th day of July, 1778.



From these "Articles of Confederation and Perpetual Union," the subjoined extracts were made.

"Article I. The style of this Confederacy shall be, the United States of America."

"Article II. Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by the Confederation delegated to the United States in Congress assembled."

"Article X. In determining questions in the United States, in Congress assembled, each State shall have one vote."

"Article XIII. Each State shall abide by the determinations of the United States, in Congress assembled, on all questions which by this Confederation are submitted to them. And the articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of the United States and be afterward confirmed by the Legislature of every State." *Davis on the History of the Confederate States*, pp. 2-3.

The Congress applied to the States for a grant of power to regulate foreign trade and commerce, and to impose duties on imports to obtain the needed revenue. It was not found possible to obtain the unanimous assent of the States, and the current of events, including the hostile commercial policy of England, rendering the grant more and more obviously necessary to the general welfare, the Congress, on February 21, 1787.

"Resolved, That it is expedient that, on the second Monday of May next, a convention of delegates, who shall have been appointed by the several States, be held in Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions thereon as shall, when agreed to in Congress and confirmed by the States, render the Federal Constitution adequate to the exigencies of Government and the preservation of the Union."

This resolution has been quoted at length because it declares the sole purpose to be to revise the Articles of Confederation and recognizes the supremacy of the States as the power to confirm the resolution to be submitted to their several legislatures. And it is to be remembered that it required the *unanimous* assent of the States to make any alteration in the Articles of Confederation. *Davis on the History of the Confederate States*, p. 304.

"The ratification of the Convention of nine States shall be sufficient for the establishment of the Constitution between the States so ratifying the same."

Therefore the names of the States were not written in the preamble, as they had been in the first draft of the Constitution, and as had been done in the Articles of Confederation, but only the general expression, "We, the People of the United States," which could mean no more than the people of the ratifying States.

If it be asked how could nine States consistently secede from the "Confederation and Perpetual Union," of which they were a component part, and the terms of which Union could not be altered unless such

alteration should "be confirmed by the Legislature of every State," it is submitted, as an answer to the question, that the States, that is, the people of each State, had never surrendered their Sovereignty, and, by virtue of it, if the Government failed to fulfill the end for which it was established, they had the unalienable right to "alter or to abolish it, and to institute a new government, laying its foundation on such principles and organizing its powers in such form, as to them should seem most likely to effect their safety and happiness." *Davis on the History of the Confederate States, p. 4.*

In Convention it was agreed that such States as chose, not less than nine in number, might establish a new form of government; which necessarily involved separation from some of their associates in the Union which they had covenanted should be perpetual. George Washington presided over their Convention, and transmitted the Constitution drafted by it to the several States, to be ratified or rejected by the people of each State in convention assembled.

The duty assigned to him was not perfunctorily performed; but, deeply anxious for the formation of the more perfect Union projected, which rested on the power of a State to secede from the old Union and accede to the new one—as provided by the closing Article (VII.) of the Constitution as submitted to the States—he exerted his great influence to secure ratification by the requisite number of States for the "establishment of the Constitution between the States so ratifying the same." In one of his letters he asks "what the opponents of the Constitution in Virginia would do if nine other States should accede to the Constitution?"

After a time the Constitution was ratified by eleven States, and the "more perfect Union," was organized, leaving two States—North Carolina and Rhode Island—sole representatives of the Confederation which had raised the Colonies to statehood and independence. The position of these two States conclusively proves that the sovereignty of each State was an admitted fact, and that it was a voluntary compact to which their assent was requested and from which it was withheld.

The power of the States, in whole or in part, to withdraw from the Union of the Confederation, in 1787, has been conceded by the succeeding generations, and the causes which led to the act have, in like manner, been admitted to be an all-sufficient justification.

And this fact suggests the inquiry, Did the States, by the adoption of the new form of government, deprive themselves of that power? and if not, did there exist, in 1861, justifiable causes for its exercise? *Davis on the History of the Confederate States, p. 5.*

Article X, in amendment of the Constitution (the more entitled to consideration because it was one of the conditions on which the Constitution was ratified), is in these words:

*"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."*

If nowhere is to be found the delegation by the States of sovereignty to the United States, that remained with the States, severally, to be exercised thereafter as it had been in 1787.

Elbridge Gerry, of Massachusetts, said, in reference to the power of nine States to withdraw from the Confederation: "If nine out of thirteen can dissolve the compact, six out of nine will be just as able to dissolve the new one hereafter." Certainly the act of withdrawal, as provided, was to be by the States severally. The number agreeing to withdraw involved the power to maintain the new government, not the right of each to separate itself from the old one. That was a function of Sovereignty, and the terms of the Constitution recognized the right of each State to exercise it; and to Mr. Gerry's contention it might be answered, the power inherently belongs not to a majority, but to each State.

It has sometimes been argued that the powers delegated by the States to the Federal Government included such as were only exercised by sovereigns. It suffices for the present to say that so did those which had been delegated to the Congress of the Confederation.

The consideration of the second branch of the inquiry involves a comparison between the causes which led to secession in 1787 and 1861. *Davis on the History of the Confederate States, p. 6.*

The South, as a minority, was naturally attached to the Constitution, as a guarantee of equal rights and protection to public and private interests. Her sons had gathered much glory under the flag of the Union; it was an emblem of free and independent States, and was the object of pride and affection of her people. A very large majority of her people believed secession to be a remedy that could be peacefully exercised. The Southern States, one after another, passed Ordinances of Secession, but they made no adequate preparations for war, because it was generally believed none were necessary. At the instance of Virginia, leading now for peace as she had led for war in the revolutionary era, a call was issued inviting the States to a convention for the purpose of securing peace to the Union. The Convention met at Washington, D. C., on February 4, 1861, a majority of Northern and Northwestern States and eight of the Southern States being represented. The effort of the wise and patriotic members to secure some proper adjustment of existing issues proved unsuccessful.

The States that had seceded met at Montgomery, Ala., February 4, 1861, formed a Provisional Government by their delegates in Congress assembled, and by them a president and vice-president was elected, and the Provisional Government was inaugurated on the 18th of the same month.

Immediately thereafter commissioners were sent to Washington with authority to negotiate with the Federal Government for a settlement of all issues between it and the seceded States on the basis of equality and good will. These efforts which continued to the expiration of Mr. Buchanan's term and into the administration of Mr. Lincoln, proved as unproductive of the desired fruit as had the Peace Congress; and yet there were not wanting those among us who believed that the Federal Government, having no grant in the Constitution, to use force against a State, would not attempt invasion, but, as did General Jackson, would limit their operations to collecting revenue from the outside of Southern ports. *Davis on the History of the Confederate States, pp. 7-8.*

Mr. Davis, in his last speech before retiring from the United States Senate because his State, Mississippi, had seceded, said among other things:

I rise, Mr. President, for the purpose of announcing to the Senate that I have satisfactory evidence that the State of Mississippi, by a solemn ordinance of her people, in convention assembled, has declared her separation from the Union States. Under these circumstances, of course, my functions are terminated here. It has seemed to me proper, however, that I should appear in the Senate to announce that fact to my associates, and I will say but very little more. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 221.*

A great man who now reposes with his fathers, and who has often been arraigned for a want of fealty to the Union, advocated the doctrine of nullification because it preserved the Union. It was because of his deep-seated attachment to the Union—the determination to find some remedy for existing ills short of severance of the ties which bound South Carolina to the other States—that Mr. Calhoun advocated the doctrine of nullification, which he proclaimed to be peaceful, to be within the limits of State power, not to disturb the Union, but only to be a means of bringing the agent to the tribunal of the States for their judgment.

Secession belongs to a different class of remedies. It is to be justified upon the basis that the States are sovereign. There was a time when none denied it. I hope the time may come again when a better comprehension of the theory of our Government, and the inalienable rights of the people of the States, will prevent any one from denying that each State is a sovereign, and thus may reclaim the grants which it has made to any agent whomsoever. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 222.*

Senator Lane, of Oregon, on March 2, 1861, in replying to a speech of Andrew Johnson, then a Senator from Tennessee, said among other things:

“Mr. President, the Senator from Tennessee complains of my remarks on his speech. He complains of the tone and temper of what I said. He complains that I replied at all, as I was a Northern Senator.” *Davis on The Rise and Fall of The Confederate Government, Vol. I, 250.*

Sir, if there is, as I contend, the right of secession, then, whenever a State exercises that right, this Government has no laws in that State to execute, nor has it any property in any such State than can be protected by the power of this Government. In attempting, however, to substitute the smooth phrases “executing the laws” and “protecting public property” for coercion, for civil war, we have an important concession; that is, that this Government dare not go before the people with a plain avowal of its real purposes and of their consequences. No sir; the policy is to inveigle the people of the North into civil war, by masking the design in smooth and ambiguous terms.—(Congressional Globe, second session, Thirty-sixth Congress, p. 1347.) *Davis on The Rise and Fall of the Confederate Government, Vol. I, 251.*



The New York Tribune—the leading organ of the party which triumphed in the election of 1860—had said, soon after the result of that election was ascertained, with reference to secession: “We hold, with Jefferson, to the inalienable right of communities to alter or abolish forms of government that have become oppressive or injurious; and, if the cotton States shall decide that they can do better out of the Union than in it, we insist on letting them go in peace. The right to secede may be a revolutionary right, *but it exists nevertheless*; and we do not see how one party can have a right to do what another party has a right to prevent. We must ever resist asserted right of any State to remain in the Union and nullify or defy the laws thereof: *to withdraw from the Union is quite another matter*. And, whenever a considerable section of our Union shall deliberately resolve to go out, *we shall not use all coercive measures designed to keep her in*. We hope never to live in a republic whereon one section is pinned to the residue by bayonets.” *Davis on the Rise and Fall of The Confederate Government, Vol. I. 252.*

The Tribune was far from being singular among its Northern contemporaries in the entertainment of such views, as Mr. Greeley, its chief editor, has shown by many citations in his book, *The American Conflict*. The Albany Argus, about the same time, said, in language which Mr. Greeley characterizes as “clear and temperate:” “We sympathize with and justify the South as far as this: their rights have been invaded to the extreme limit possible within the forms of the Constitution; and, beyond this limit, their feelings have been insulted and their interests and honor assailed by almost every possible form of denunciation and invective; and, if we deemed it certain that the real *animus* of the Republican party could be carried into the administration of the Federal Government, and become the permanent policy of the nation, we should think that all the instincts of self-preservation and of manhood rightfully impelled them to a resort to revolution and a separation from the Union, and we would applaud them and wish them godspeed in the adoption of such a remedy.”

Again, the same paper said, a day or two afterward: “If South Carolina or any other State, through a convention of her people, shall formally separate herself from the Union, probably both the present and the next Executive will simply let her alone and *quietly allow all the functions of the Federal Government within her limits to be suspended*. Any other course would be madness; as it would at once enlist all the Southern States in the controversy and plunge the whole country into a civil war. . . . As a matter of policy and wisdom, therefore, independent of the question of right, we should deem resort to force most disastrous.”

The New York Herald—a journal which claimed to be independent of all party influences—about the same period said: “Each State is organized as a complete government, holding the purse and wielding the sword, possessing the right to break the tie of the confederation as a nation might break a treaty, and to repel coercion as a nation might repel invasion. . . . Coercion, if it were possible, is out of the question.”

On the 31st of January, 1861—after six States had already seceded—a great meeting was held in the city of New York, to consider the

perilous condition of the country. At this meeting Mr. James S. Thayer, an old-line Whig, made a speech, which was received with great applause. The following extracts from the published report of Mr. Thayer's speech will show the character of the views which then commanded the cordial approval of that metropolitan audience:

"We can at least, in an authoritative way and a practical manner, arrive at the basis of a *peaceable separation*. (Cheers). We can at least by discussion enlighten, settle, and concentrate the public sentiment in the State of New York upon this question, and save it from a fearful current, which circuitously but certainly sweeps madly on, through the narrow gorge of 'the enforcement of the laws,' to the shoreless ocean of civil war! (Cheers). Against this, under all circumstances, in every place and form, we must now and at all times oppose a resolute and unfaltering resistance. The public mind will bear the avowal, and let us make it—that, if a revolution of force is to begin, *it shall be inaugurated at home*. And if the incoming Administration shall attempt to carry out the line of the policy that has been forshadowed, we announce that, when the hand of Black Republicanism turns to blood-red, and seeks *from the fragment of the Constitution to construct a scaffolding for coercion—another name for execution*—we will reverse the order of the French Revolution, and save the blood of the people by making those who would inaugurate a reign of terror the first victims of a national guillotine!" (Enthusiastic applause.)

And again:

"It is announced that the Republican Administration will enforce the laws against and in all the seceding States. A nice discrimination must be exercised in the performance of this duty. You remember the story of William Tell. . . . Let an arrow winged by the Federal bow strike the heart of the American citizen, and who can number the avenging darts that will cloud the heavens in the conflict that will ensue? (Prolonged applause.) What, then, is the duty of the State of New York? What shall we say to our people when we come back to meet this state of facts? That the Union must be preserved? But, if that can not be, what then? *Peaceable separation*. (Applause.) Painful and humiliating as it is, let us temper it with all we can of love and kindness, so that we may yet be left in a comparatively prosperous condition, in friendly relations with another Confederacy." (Cheers.)

At the same meeting ex-Governor Horatio Seymour asked the question—on which subsequent events have cast their own commentary—whether successful coercion by the North is less revolutionary than successful secession by the South? "Shall we prevent revolution (he added) by being foremost in overthrowing the principles of our Government, and all that makes it valuable to our people and distinguish it among the nations of the earth?"

The venerable ex-Chancellor Wallworth thus expressed himself:

"It would be as brutal, in my opinion, to send men to butcher our own brothers of the Southern States as it would be to massacre them in the Northern States. We are told, however, that it is our duty to, and we must, enforce the laws. But why—and what laws are to be enforced? There were laws that were to be enforced in the time of

the American Revolution. . . . Did Lord Chatham go for enforcing those laws? No, he gloried in defense of the liberties of America. He made that memorable declaration in the British Parliament, 'If I were an American citizen, instead of being, as I am, an Englishman, I would never submit to such laws—never, never, never!'" (Prolonged applause.)

Other distinguished speakers expressed themselves in similar terms—varying somewhat in their estimate of the propriety of the secession of the Southern States, but all agreeing in emphatic and unqualified reprobation of the idea of coercion. A series of conciliatory resolutions was adopted, one of which declares that "civil wars will not restore the Union, but will defeat forever its reconstruction." *Davis on The Rise and Fall of The Confederate Government, Vol. I, 253-4-5.*

The "Union," of Bangor, Maine, spoke no less decidedly to the same effect:

"The difficulties between the North and the South must be compromised, or the separation of the States *shall be peaceable*. If the Republican party refuse to go the full length of the Crittenden amendment—which is the very least the South can or ought to take—then, here in Maine, not a Democrat will be found who will raise his arm against his brethren of the South. From one end of the State to the other let the cry of the Democracy be, COMPROMISE OR PEACEABLE SEPARATION!" *Davis on The Rise and Fall of The Confederate Government, Vol. I, 256.*

These extracts will serve to show that the people of the South were not without grounds for cherishing the hope, to which they so fondly clung, that the separation would, indeed, be as peaceable in fact as it was, on their part, in purpose; that the conservative and patriotic feeling still existing in the North would control the elements of sectional hatred and bloodthirsty fanaticism, and that there would be really no war.

And here the ingenuous reader may very naturally ask, What became of all this feeling? How was it that, in the course of a few weeks, it had disappeared like a morning mist? Where was the host of men who had declared that an army marching to invade the Southern States should first pass over their dead bodies? No new question had risen—no change in the attitude occupied by the seceding States—no cause for controversy not already existing when these utterances were made. And yet the sentiments which they expressed were so entirely swept away by the tide of reckless fury which soon afterward impelled an armed invasion of the South, that (with a few praiseworthy but powerless exceptions) scarcely a vestige of them was left. Not only were they obliterated, but seemingly forgotten. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 257.*

### **Slavery Not the Cause of Secession**

Men differed in their views as to the abstract question of its right or wrong, but for two generations after the Revolution there was no geographical line of demarkation for such differences. The African slave-trade was carried on almost exclusively by New England merchants and Northern ships. Mr. Jefferson—a Southern man, the

founder of the Democratic party, and the vindicator of State rights—was in theory a consistent enemy to every form of slavery. The Southern States took the lead in prohibiting the slave-trade, and, as we have seen, one of them (Georgia) was the first State to incorporate such a prohibition in her organic Constitution. Eleven years after the agitation on the Missouri question, when the subject first took a sectional shape, the abolition was proposed and earnestly debated in the Virginia Legislature, and its advocates were so near the accomplishment of their purpose, that a declaration in its favor was defeated only by a small majority, and that on the ground of expediency. At a still later period, abolitionist lecturers and teachers were mobbed, assaulted and threatened with tar and feathers in New York, Pennsylvania, Massachusetts, New Hampshire, Connecticut, and other States. One of them (Lovejoy) was actually killed by a mob in Illinois as late as 1837.

These facts prove incontestably that the sectional hostility which exhibited itself in 1820, on the application of Missouri for admission into the Union, which again broke out on the proposition for the annexation of Texas in 1844, and which reappeared after the Mexican war, never again to be suppressed until its fell results had been fully accomplished, was not the consequence of any difference on the abstract question of slavery. It was the offspring of sectional rivalry and political ambition. It would have manifested itself just as certainly if slavery had existed in all the States, or if there had not been a negro in America. No such pretension was made in 1803 or 1811, when the Louisiana purchase, and afterward the admission into the Union of the State of that name, elicited threats of disunion from the representatives of New England. The complaint was not of slavery, but of "the acquisition of more weight at the other extremity" of the Union. It was not slavery that threatened a rupture in 1832, but the unjust and unequal operation of a protective tariff.

It happened, however, on all these occasions, that the line of demarkation of sectional interests coincided exactly or very nearly with that dividing the States in which negro servitude existed from those in which it had been abolished. It corresponded with the prediction of Mr. Pickering, in 1803, that, in the separation certainly to come, "the white and black population would mark the boundary"—a prediction made without any reference to slavery as a source of disunion. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 78-9.*

### **Prophecies As to Secession**

Mr. Webster in his great speech called "The Constitution and The Union," said:

I hear with distress and anguish the word "secession," especially when it falls from the lips of those who are patriotic, and known to the country, and known all over the world, for their political services. Secession! Peaceable secession! Sir, your eyes and mine are never destined to see that miracle. The dismemberment of this vast country without convulsion! The breaking up of the fountains of the great deep without ruffling the surface! Who is so foolish, I beg



everybody's pardon, as to expect to see any such thing? Sir, he who sees these States, now revolving in harmony around a common centre, and expects to see them quit their places and fly off without convulsion, may look the next hour to see the heavenly bodies rush from their spheres, and jostle against each other in the realms of space, without causing the wreck of the universe. There can be no such thing as a peaceable secession. Peaceable secession is an utter impossibility. Is the great Constitution under which we live, covering this whole country, is it to be thawed and melted away by secession, as the snows on the mountain melt under the influence of a vernal sun, disappear almost unobserved, and run off? No, sir! No, sir! I will not state what might produce the disruption of the Union; but, sir, I see as plainly as I see the sun in heaven what that disruption itself must produce; I see that it must produce war,<sup>1</sup> and such a war as I will not describe, *in its twofold character*. 5 *Webster's Works*, (7th ed.), p. 361.

I hear the cry of disunion, secession. The secession of individual States, to my mind, is the most absurd of all ideas. I should like to know how South Carolina is to get out of this Union. Where is she to go? The commercial people of Charleston say, with truth and propriety, if South Carolina secedes from the Union, we secede from South Carolina. The thing is absurd. A separate secession is an absurdity. It could not take place. It must lead to war. I do, indeed, admit the possibility that a great mass of the Southern States, if they should come so far north as to include Virginia, might make a Southern confederation. 2 *Webster's Works*, (7th ed.), p. 591.

In 1833 Mr. Madison wrote Mr. Clay as follows, as to the Southern States seceding:

It is painful to observe the unceasing efforts to alarm the South by imputations against the North of unconstitutional designs on the subject of the slaves. You are right, I have no doubt, in believing that no such intermeddling disposition exists in the body of our Northern brethren. Their good faith is sufficiently guaranteed by the interest they have as merchants, as ship-owners, and as manufacturers, in preserving a union with the slaveholding States. On the other hand, what *madness* in the South to look for safety in disunion. It would be worse than jumping out of the frying-pan into the fire: it would be jumping into the fire for fear of the frying-pan. The danger from the alarm is, that the pride and resentment exerted by them may be an overmatch for the dictates of prudence, and favor the project of a Southern Convention, insidiously revived, as promising, by its councils, the best securities against grievances of every sort from the North. 4 *Writings of Madison*, p. 301.

### Secession a Fundamental Right

Mr. Calhoun thus stated the doctrine of Secession:

That a State, as a party to the constitutional compact, has the right to secede,—acting in the same capacity in which it ratified the

<sup>1</sup>Mr. Webster was here prophetic as well as eloquent.

constitution,—cannot, with any show of reason, be denied by any one who regards the Constitution as a compact,—if a power should be inserted by the amending power, which would radically change the character of the Constitution, or the nature of the system; or if the former should fail to fulfill the ends for which it was established. This results, necessarily, from the nature of a compact,—where the parties to it are sovereign; and, of course, have no higher authority to which to appeal. That the effect of secession would be to place her in the relation of a foreign State to the others, is equally clear. Nor is it less so, that it would make her, (not her citizens *individually*,) responsible to them, in that character. All this results, necessarily, from the nature of a compact between sovereign parties. *1 Calhoun's Works, p. 301.*

As to the Citizens of the State he says:

They are bound to obey them, only, because the State, to which they owe allegiance, by ratifying, ordained and established it as its own constitution and government; just in the same way, in which it ordained and established its own separate constitution and government,—and by precisely the same authority. They owe *obedience* to both; because their State commanded them to obey; but they owe *allegiance* to neither; since sovereignty, by a fundamental principle of our system, resides in the *people*, and not in the *government*. The same authority which commanded *obedience*, has the right, in both cases, to determine, as far as they are concerned, the extent to which they were bound to obey; and this determination remains binding until rescinded by the authority which pronounced and declared it. *1 Calhoun's Works, p. 302.*

### Lincoln on Secession

The following are Mr. Lincoln's views of Secession and State Rights. In his first inaugural address, he said:

I hold that in contemplation of the universal law and the Constitution of the United States, the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our National Constitution, and the Union will endure forever, it being impossible to destroy it except by some action provided for in the instrument itself.

Again: If the United States be not a government proper, but an association of States in the nature of contract merely, can it, as a contract, be peaceably unmade by less than all the parties who made it? One party to a contract may violate it—break it, so to speak—but does it not require all to lawfully rescind it?

Descending from these general principles, we find the proposition that in legal contemplation the Union is perpetually confirmed by the history of the Union itself. The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured, and the faith of all the

then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And finally, in 1787, one of the declared objects for ordaining and establishing the Constitution was "*to form a more perfect Union.*"

But if destruction of the Union by one or by part only of the States be lawfully possible, the Union is *less* perfect than before the Constitution, having lost the vital elements of perpetuity.

It follows from these views that no State upon its own mere motion can lawfully get out of the Union; that resolves and ordinances to that effect are legally void, and that acts of violence within any State or States against the authority of the United States are insurrectionary or revolutionary, according to circumstances. *Messages and Papers of the Presidents, Vol. VI, p. 7.*

### **Secession and the Dred Scott Decision**

It is contended by many that Secession and the War between the States was the result of a part of the Northern States refusing to abide by the decision of the Supreme Court of the United States, or to abide by or accept the construction which the Court placed upon this provision of the Constitution. It was contended by the Southern States that the election of Mr. Lincoln meant that the Northern States, the President, and Congress, had determined that this decision was to be overruled, and the Constitution, as constructed by the Court, disregarded. This question was discussed by Mr. Lincoln in his inaugural address, as follows:

I do not forget the position assumed by some that the constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that limited case, with the chance that it might be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal. Nor is there any assault upon the court or the judges. *Messages and Papers of the Presidents, Vol. VI, p. 9.*

### **Secession at the Bar of the Supreme Court**

During the war the Northern States, Congress, and the President, contended that a State could not constitutionally,

or lawfully secede or go out of the Union. As soon as the war was over and the seceding States surrendered, the same Congress contended that the Southern States did secede and were out of the Union, and proceeded to reconstruct them. The President, however, did not agree with Congress and, partly if not wholly, on this account Congress came near removing him by impeachment. The Supreme Court agreed with the President when the question at last reached that Court.

In *White v. Hart*, 13 Wall. 646, the court, Mr. Justice Swayne delivering the opinion, adjudged these positions wholly untenable. Georgia, it was held, had never been out of the Union; and though its rights under the Constitution had been suspended, to bring her back into full communion with the loyal States nothing was necessary but to permit her to restore her representative in Congress. The action of Congress in the premises cannot be inquired into, but must be accepted and followed by the judicial department. But Congress could sanction and legalize a violation of the Federal Constitution. Contracts for the sale or hire of slaves effected before emancipation were valid, and to take away all remedy for their enforcement impaired their obligation. A provision to that effect was consequently null, and the holders of such contracts might proceed as if it had never had an existence. The same views were reaffirmed in *Osborn v. Nicholson*, 13 Wall. 654, arising under the Constitution of Kansas. *Story on the Constitution, Vol. V, p. 710, (note).*

It was decided in the case of *Texas v. White*, 7 Wall. 700, that Texas was and remained a State, a member of the United States, after the Acts of Secession, and even during the war, and that Acts of Congress could not exclude her therefrom, and that she had a right to sue in the Federal Courts, as a State, notwithstanding the re-construction acts of Congress. It is there said that the Constitution in all its provisions looks to an indestructible union, composed of indestructible States.

### **How Secession Could Have Been Averted**

Mr. Crittenden, of Kentucky, the oldest and one of the most honored members of the Senate, introduced into that body a joint resolution proposing amendments to the Constitution—among them the restoration and incorporation into the Constitution of the geographical line of the Missouri Compromise, with other provisions, which it was hoped might be accepted as the basis for an adjustment of the difficulties rapidly hurrying the Union to disruption. But the earnest appeals of that venerable statesman were unheeded by Senators of the so-called Republican party. Action upon his proposition was postponed from time to time, on one pretext or another, until the last day of the session—when seven States had already withdrawn from the Union and established a confederation of their own—and it was then defeated by a majority of one vote. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 60.*



Had this resolution been acted on promptly, it would have passed, and Secession and the War between the States never would have occurred. The Constitution then not only allowed slavery, but it expressly provided that the institution should be protected by the Federal Government, and Congress had passed fugitive slave acts to enforce the Constitutional guaranty. Some of the Northern States repudiated and publicly disregarded the Constitutional provision and Acts of Congress. They not only nullified the Acts of Congress, but the Constitution as well. The Abolitionists, and there were millions of them, openly and publicly denounced the Constitution and Acts of Congress on the subject. They denounced the Constitution in the pulpits as a "covenant with the devil and a league with hell." There was a wide-spread determination in the North not to observe the Constitution, nor to allow the South their Constitutional rights.

### **The Immediate Cause of Secession**

The result of the Presidential election of 1860 was the direct and immediate cause of the Southern States seceding. The people of these seceding States, or a majority thereof, believed that the incoming administration would not respect their political and civil rights guaranteed to them under the Constitution, that they were powerless to secure them in the Union, and that they were driven to one of two courses, to submit to being deprived of these constitutional rights or to withdraw from the Union, they chose the latter course. The administration denied their right or power, and attempted to coerce them by force to remain in the Union and to consider the people of these States who were attempting to secede as rebels. The Southern States never found fault with the Federal Constitution, they never demanded a right except such as the Constitution guaranteed to them. It was the Northern States which were displeased with the Constitution and refused to abide by it as construed by the Supreme Court of the unseceded States in the Dred Scott decision. These States claimed that Congress had the right and power to control the question of slavery in all Territory of the United States, not forming a part of the State, while the Constitution as construed in this case denied this right or power to Congress.

Mr. Davis, the first and only president of the Confederate States, thus states the immediate causes leading to the secession by these States:

The indignation with which the result of the Presidential election was received in the Southern States proceeded from no personal hostility to the President-elect, nor from the chagrin at the defeat of the Democratic candidates, but from the fact that the people of the South recognized in Mr. Lincoln the representative of a party professing principles destructive to "their peace, their prosperity, and their domestic tranquillity."

No rash or revolutionary action was taken by the Southern States. The measures for defense adopted were considerate, and were executed deliberately. *Davis on the History of the Confederate States, 37.*

The character of the President in power now became an important factor in the situation. Mr. Buchanan's freedom from sectional asperity, his long life in the public service, his conciliatory disposition, his love of peace, and his reverence for the Constitution, were guarantees that he would not precipitate a conflict with any of the States. But it soon became evident that in the closing months of his administration he had little power to mould the policy of the future. Like all intelligent and impartial students of constitutional history, the President held that the Federal Government had no rightful power to coerce a State. Like his wise and patriotic predecessors in office, he believed that our Union rests upon public opinion, and can never be cemented by the blood of its citizens shed in civil war; that if it could not live in the affections of the people it must one day perish; and that although Congress may possess many means of preserving it by conciliation, the sword was not placed in their hand to preserve it by force. (Message of December Term, 1860). *Davis on the History of the Confederate States, 37-8.*

It was still recalled that a proposition to authorize the use of force against a delinquent State, introduced into the Convention that framed the Constitution, had been defeated, because, as Mr. Madison urged, "the use of force against a State would look more like a declaration of war, and would probably be considered by the party attacked as a dissolution of all former compacts by which it might be bound." Although the appeals to passion, preparing the Northern people to support a war against the Southern States, in the event of secession, were general and vehement, there were not wanting protests against this policy even in the ranks of the Republicans. But the strident roar of prejudice and passion drowned the still small voice of constitutional duty. *Davis on the History of the Confederate States, 38.*

South Carolina, by unanimous vote of her Convention, on December 20, 1860, passed an Ordinance revoking her delegated powers and withdrawing from the Union. The other cotton planting States also made preparations for secession, but delayed final action for some time in the hope that Congress might avert the necessity by measures of conciliation. Seeing the hopelessness of delay, by the failure of all overtures during the first month of the session, they hastened to exercise what was generally admitted to be an undoubted right appertaining to their sovereignty as States, and the only peaceful remedy that remained for the evils already felt and the dangers feared. *Davis on the History of the Confederate States, 43.*

The Southern States have been persistently represented as the propagandists of slavery, and the Northern States as the defenders and champions of universal freedom. It has been dogmatically asserted that the war between the States was caused by efforts on the one side to extend and perpetuate human slavery, and on the other to resist it and establish liberty. Neither allegation is true.

To whatever extent the question of slavery may have served as an occasion, it was far from being the cause of the war.

As an historical fact, negro slavery existed in all the original thirteen States. It was recognized by the Constitution. Owing to climatic, industrial and economical—not moral or sentimental—reasons, it had gradually disappeared in the Northern States, while it had persisted in the Southern States. The slave-trade was never conducted by the people of the South. It had been monopolized by Northern merchants and carried on in Northern ships. Men differed in their views as to the abstract question of the right or wrong of slavery; but, for two generations after the Revolution, there was no geographical line of such differences. It was during the controversy over the Missouri question that the subject first took sectional aspect; but long after that period Abolitionists were mobbed and assaulted in the North. Lovejoy, for example, was killed in Illinois in 1837.

These facts prove that the sectional hostility which first appeared in 1820, in the Missouri controversy, and again broke out on the proposition to annex Texas, in 1844, and reappeared after the Mexican war, never again to be suppressed until its full results had been fully accomplished, was not the consequence of any differences on the abstract question of slavery. It was the offspring of sectional rivalry and political ambition. *Davis on the History of the Confederate States*, 44.

In 1803 and 1811, when the Louisiana Purchase, and afterward the admission of the State of Louisiana, created threats of disunion from the representatives of New England, it is not pretended that the existence of slavery was the ground of opposition. The complaint *then* was not of slavery, but of the acquisition of more weight at the other extremity of the Union. It was not slavery that threatened a rupture in 1832, but an unjust and unequal tariff.

Of course, the diversity of institutions contributed to the conflict of interests. I am stating general principles, not defining modifications and exceptions with the procession of a mathematical proposition. The truth remains, intact and incontrovertible, that the existence of African servitude was in nowise the cause of the conflict, but only an incident of it. In the later controversies, however, its effect as a lever in operating on the passions, prejudices, and sympathies of men was so potent that it has darkened the whole horizon of historic truth.

I have not attempted, therefore, and shall not permit myself to be drawn into any discussion of the merits or demerits of slavery as an ethical or even as a political question. Such discussion would only serve to divert attention from the genuine issue involved.

As to the institution of negro slavery, it was entirely subject to the control of the States. No power was given to the General Government to interfere with it; but an obligation was imposed to protect

it. Its existence and validity were distinctly recognized by the Constitution in the apportionment of direct taxation and representation, in the provision for extinguishing the slave-trade, and in the article providing for the rendition of fugitives from service and labor. *Davis on the History of the Confederate States, 45.*

It was not the passage of the "Personal Liberty Laws," it was not the circulation of incendiary documents, it was not the raid of John Brown, it was not the operation of unjust and unequal tariff laws, that constituted the intolerable grievance; but it was also the systematic and persistent struggle to deprive the Southern States of equality in the Union, and generally to discriminating against the interests of their people, culminating in their exclusion from the Territories, the common property of the States, as well as by the infraction of their compact to promote domestic tranquillity. *Davis on the History of the Confederate States, 46.*

The Dred Scott Case conclusively establishes the fact that the Southern States were claiming to stand by the Constitution as construed by the Constitutional authority and that the Northern States and the administration of the Federal Government beginning in 1861 would not be bound by this construction of the Constitution. Mr. Davis says of it:

After long and patient consideration of the case the decision of the Supreme Court was pronounced by Chief Justice Taney, seven of the nine Judges who composed the Court concurring in it. The salient points established by the decision were, that persons of the African race were not and could not be acknowledged as "part of the people," or citizens under the Constitution; that Congress had no right to exclude citizens of the South from taking their negro servants or any other property into any part of the common territory, and that they were entitled to its protection therein; and, finally, as a consequence of this principle, that the Missouri Compromise of 1820, in so far as it prohibited the existence of African servitude north of a designated line, was unconstitutional and void.

Instead of accepting the decision of this then august tribunal as conclusive of a controversy that had long disturbed the peace and was threatening the perpetuity of the Union, it was flouted, denounced, and utterly disregarded by the Northern agitators, and served only to stimulate the intensity of their sectional hostility.

What resource for justice, what assurance of tranquillity, what guarantee of safety, now remained for the South? No alternative remained except to seek, out of the Union, that security which they had vainly endeavored to obtain within it. The hope of our people may be stated in a sentence: it was to escape from injury and strife within the Union; to find prosperity and peace out of it. *Davis on the History of the Confederate States, 47.*

### **The Occupation of Fort Sumter**

On the secession of South Carolina, the conditions of the defences of Charleston Harbor became a subject of general anxiety. Of the



three forts of the harbor, one only—Fort Moultrie—was occupied, and that was held by a garrison of less than a hundred effective men, under the command of Major Robert Anderson.

About two weeks before the passage of the Ordinance of Secession the congressional representatives of South Carolina called on President Buchanan, to assure him, in anticipation of that event, that the State authorities had no immediate intention of attacking or molesting the Federal forts, provided that no reinforcements should be sent and that the military situation should remain unchanged. While he declined to make any formal pledge, the delegation understood the President as approving this suggestion. Subsequent developments have shown, however, that, both before and after the secession of South Carolina, preparations were secretly made for reinforcing Major Anderson. *Davis on the History of Confederate States*, 56.

Mr. Davis, President of the Confederacy, thus describes the unfortunate affair:

Before commissioners could communicate with the President an event occurred which changed the whole aspect of affairs. On December 26th, the whole country was electrified by the news that, during the previous night, Major Anderson had dismantled Fort Moultrie, spiked his guns, burned his gun-carriages, and removed his command to Fort Sumter, which occupied a more commanding position in the harbor.

This action was regarded by the Government and people of South Carolina as a violation of the implied pledge of a maintenance of the *status quo*. The remaining forts and other public property were at once taken possession of by the State, and the condition of public opinion became greatly excited. An interview between the President and the commissioners was followed by a sharp correspondence, and negotiations were soon abruptly broken off.

In the meantime, Mr. Cass, Secretary of State, had resigned because, it was said, the President had refused to send reinforcements to Charleston; and on the occupation of Fort Sumter, which he regarded as a violation of the pledge given or implied by the Government, Mr. Floyd resigned, because the President refused to withdraw the garrison from the harbor.

Personally, I urged the President to withdraw this garrison, as it only served as a menace—for it was utterly incapable of holding the fort if attacked; while nothing would have operated more powerfully to quiet the apprehension and allay the resentment of the people of South Carolina than the withdrawal of the impotent menace. Mr. Buchanan's abiding hope was to avert a collision, or at least to postpone it beyond the close of his official term. The management of the whole affair was what Talleyrand described as something worse than a crime—a blunder. Whatever treatment the case demanded should have been prompt. To wait was fatuity.

The ill-advised attempt to reinforce and provision Fort Sumter by the steamer *Star of the West* resulted in the repulse of that vessel at the mouth of the harbor. On January 9th, on her refusal to heave

to, she was fired upon, and she put back to sea with her supplies and concealed recruits. *Davis on the History of the Confederate States*, 57.

The sites of forts, arsenals, navy-yards, and other public property of the Federal Government were ceded by the States, within whose limits they were, subject to the condition, either expressed or implied, that they should be used solely and exclusively for the purposes for which they were granted. The ultimate ownership of the soil, or eminent domain, remain with the people of the State in which it lies, by virtue of their sovereignty. Thus, the State of Massachusetts has declared that—

“The sovereignty and jurisdiction of the Commonwealth extend to all places within the boundaries thereof, subject only to such rights of *concurrent jurisdiction* as have been or may be granted over any places ceded by the Commonwealth to the United States.” *Davis on The Rise and Fall of The Confederate Government*, Vol. I, 209.

On the secession of South Carolina, the condition of the defenses of Charleston Harbor became a subject of anxiety with all parties. Of the three forts in or at the entrance of the harbor, two were unoccupied, but the third (Fort Moultrie) was held by a garrison of but little more than one hundred men—of whom sixty-three were said to be effectives—under command of Major Robert Anderson, of the First Artillery.

About twelve days before the secession of South Carolina, the representatives in Congress from that State had called on the President to assure him, in anticipation of the secession of the State, that no purpose was entertained by South Carolina to attack, or in any way molest, the forts held by the United States in the harbor of Charleston—at least until opportunity could be had for an amicable settlement of all questions that might arise with regard to these forts and other public property—provided that no re-enforcements should be sent, and the military status should be permitted to remain unchanged. The South Carolinians understood Mr. Buchanan as approving of this suggestion although declining to make any formal pledge.

It appears, nevertheless, from subsequent developments, that both before and after the secession of South Carolina preparations were secretly made for re-enforcing Major Anderson, in case it should be deemed necessary by the Government of Washington. On the 11th of December instructions were communicated to him, from the War Department, of which the following is the essential part.

“You are carefully to avoid every act which would needlessly tend to provoke aggression; and for that reason you are not, without evident and imminent necessity, to take up any position which could be construed into the assumption of a hostile attitude, but you are to hold possession of the forts in this harbor, and, if attacked, you are to defend yourself to the last extremity. The smallness of your force will not permit you, perhaps, to occupy more than one of the three forts, but an attack on, or attempt to take possession of either of them, will be regarded as an act of hostility, and you may then put your command into either of them which you may deem most

proper to increase its power of resistance. You are also authorized to take similar defensive steps, whenever you have tangible evidence of a design to proceed to a hostile act."

These instructions were afterward modified—as we are informed by Mr. Buchanan—so as, instead of requiring him to defend himself "to the last extremity," to direct him to do so as long as any reasonable hope remained of saving the fort. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 212-13.*

Another Commissioner (the Hon. I. W. Hayne) was sent to Washington by the Governor of South Carolina, to effect, if possible, an amicable and peaceful transfer of the fort, and settlement of all questions relating to property. This Commissioner remained for nearly a month, endeavoring to accomplish the objects of his mission, but was met only by evasive and unsatisfactory answers, and eventually returned without having effected anything.

There is one passage in the last letter of Colonel Hayne to the President which presents the case of the occupancy of Fort Sumter by the United States troops so clearly and forcibly that it may be proper to quote it. He writes as follows:

"You say that the fort was garrisoned for our protection, and is held for the same purposes for which it has been ever held since its construction. Are you not aware, that to hold, in the territory of a foreign power, a fortress against her will, avowedly for the purpose of protecting her citizens, is perhaps the highest insult which one government can offer to another? But Fort Sumter was never garrisoned at all until South Carolina had dissolved her connection with your Government. This garrison entered it in the night, with every circumstance of secrecy, after spiking the guns and burning the gun-carriages and cutting down the flag-staff of an adjacent fort, which was then abandoned. South Carolina had not taken Fort Sumter into her possession, only because of her misplaced confidence in a Government which deceived her." *Davis on The Rise and Fall of The Confederate Government, Vol. I, 219.*

### The Evacuation of Fort Sumter

Mr. Davis, as president of the Confederacy, sent a commission to Washington to confer with the President of the Union States as to the forts in the Southern States. This commission consisted of Judge Campbell, a Justice of the Supreme Court of the United States, but who resigned when Alabama, his home State, seceded; Mr. Crawford, a Judge of the Supreme Court of Georgia; and Mr. Forsyth, of Alabama.

Mr. Davis gives this account, among other things, as to the acts of the Commission, the mode with which they were treated and the results of their efforts:

On the 12th of March—eight days after the inauguration of Mr. Lincoln—the two commissioners then present, Messrs. Forsyth and Crawford, addressed to Mr. Seward, Secretary of State, a note informing him of their presence, stating the friendly and peaceful pur-

poses of their mission, and requesting the appointment of a day, as early as possible, for the presentation to the President of the United States of their credentials and the objects which they had in view. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 266.*

No written answer to the note of the Commissioners was delivered to them for twenty-seven days after it was written. The paper of Mr. Seward, in reply, without signature or address, dated March 15th, was "filed," as he states, on that day, in the Department of State, but a copy of it was not handed to the Commissioners until the 8th of April. But an oral answer had been made to the note of the Commissioners at a much earlier date, for the significance of which it will be necessary to bear in mind the condition of affairs at Charleston and Pensacola. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 266.*

The letter of the Commissioners to Mr. Seward was written, as we have seen, on the 12th of March. The oral message, above mentioned, was obtained and communicated to the Commissioners through the agency of the two judges of the Supreme Court of the United States—Justices Nelson, of New York, and Campbell, of Alabama. On the 15th of March, according to the statement of Judge Campbell, Mr. Justice Nelson visited the Secretaries of State and of the Treasury and the Attorney-General (Messrs. Seward, Chase, and Bates), to dissuade them from undertaking to put in execution any policy of coercion. "During the term of the Supreme Court he had very carefully examined the laws of the United States to enable him to attain his conclusions, and from time to time he had consulted the Chief Justice (Taney) upon the questions which his examination had suggested. His conclusion was that, without very serious violations of Constitution and statutes, coercion could not be successfully effected by the executive department." *Davis on The Rise and Fall of The Confederate Government, Vol. I, 267.*

The result of the interview between these two distinguished gentlemen, we are informed, was another visit, by both of them, to the State Department, for the purpose of urging Mr. Seward to reply to the Commissioners, and assure them of the desire of the United States Government for a friendly adjustment. Mr. Seward seems to have objected to an immediate recognition of the Commissioners, on the ground that the state of public sentiment in the North would not sustain it, in connection with the withdrawal of the troops from Fort Sumter, which had been determined on. "The evacuation of Sumter," he said, "is as much as the Administration can bear."

Judge Campbell adds: "I concurred in the conclusion that the evacuation of Sumter involved responsibility, and stated that there could not be too much caution in the adoption of measures so as not to shock or to irritate the public sentiment, and that the evacuation of Sumter was sufficient for the present in that direction. I stated that I would see the Commissioners, and I would write to Mr. Davis to that effect. I asked him what I should say as to Sumter and as to Pickens. *He authorized me to say that, before that letter could reach him (Mr. Davis), he would learn by telegraph that the order for the*



evacuation of Sumter had been made. He said the condition of Pickens was satisfactory, and there would be no change made there." *Davis on The Rise and Fall of The Confederate Government, Vol. I, 268-9.*

Judge Campbell tells us that Mr. Crawford was slow to consent to refrain from pressing the demand for recognition. "It was only after some discussion and the expression of some objections that he consented" to do so. This consent was the pledge that the fort would be evacuated in the course of a few days. Mr. Crawford required the pledge of Mr. Seward to be reduced to writing, with Judge Campbell's personal assurance of its genuineness and accuracy. This written statement was exhibited to Judge Nelson, before its delivery, and approved by him. The fact that the pledge had been given in his name and behalf was communicated to Mr. Seward the same evening by letter. He was cognizant of, consenting to, and in great part the author of, the whole transaction.

It will be observed that not only the commissioners in Washington, but the Confederate Government at Montgomery also, were thus assured on the highest authority—that of the Secretary of State of the United States, the official organ of communication of the views and purposes of his Government—of the intention of that Government to order the evacuation of Fort Sumter within a few days from the 15th of March, and not to disturb the existing *status* at Fort Pickens. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 268.*

Of the result of these interviews, Judge Campbell states: "The last was full and satisfactory. The Secretary was buoyant and sanguine; he spoke of his ability to carry through his policy with confidence. He accounted for the delay as accidental, and *not involving the integrity of his assurance that the evacuation would take place*, and that I should know whenever any change was made in the resolution in reference to Sumter or to Pickens. I repeated this assurance in writing to Judge Crawford, and informed Governor Seward in writing what I had said."

It would be incredible, but for the ample proofs which have since been brought to light, that, during all this period of reiterated assurances of a purpose to withdraw the garrison from Fort Sumter, and of excuses for delay on account of the difficulties which embarrassed it, the Government of the United States was assiduously engaged in devising means for furnishing supplies and re-enforcements to the garrison, with the view of retaining possession of the fort! *Davis on The Rise and Fall of The Confederate Government, Vol. I, 270.*

Mr. Davis is of the opinion that the President, Mr. Lincoln, was aware of the artifice and deception practiced. He says:

Mr. Seward, throughout the whole negotiation, was fully informed of the views of his colleagues in the Cabinet and of the President. Whatever his real hopes or purposes may have been in the beginning, it is positively certain that long before the end, and while still re-

iterating his assurances that the garrison would be withdrawn, he knew that it had been *determined*, and that active preparations were in progress, to strengthen it.

Mr. Gideon Welles, who was Secretary of the Navy in Mr. Lincoln's Cabinet, gives the following account of the transactions of that period:

"One evening in the latter part of the month of March, there was a small gathering at the Executive Mansion, while the Sumter question was still pending. The members of the Cabinet were soon individually and quietly invited into the council-chamber, where, as soon as assembled, the President informed them he had just been advised by General Scott that it was expedient to evacuate Fort Pickens, as well as Fort Sumter, which last was assumed at military headquarters to be a determined fact, in conformity with the views of Secretary Seward and the General-in-Chief. . . .

"A brief silence followed the announcement of the amazing recommendation of General Scott, when Mr. Blair, who had been much annoyed by the vacillating course of the General-in-Chief in regard to Sumter, remarked, looking earnestly at Mr. Seward, that it was evident that the old General was playing politician in regard to both Sumter and Pickens; for it was not possible, if there was a defense, for the rebels to take Pickens; and the Administration would not be justified if it listened to his advice and evacuated either. Very soon thereafter, I think at the next Cabinet meeting, the President announced his decision *that supplies should be sent to Sumter*, and issued confidential orders to that effect. All were gratified with his decision, except Mr. Seward, who still remonstrated, *but preparations were immediately commenced to fit out an expedition to forward supplies.*" *Davis on the Rise and Fall of The Confederate Government, Vol. I, 277.*

Mr. Douglas, of Illinois—who was certainly not suspected of sympathy with secession, or lack of devotion to the Union—on the 15th of March offered a resolution recommending the withdrawal of the garrisons from all forts within the limits of the States which had seceded, except those at Key West and the Dry Tortugas. In support of this resolution he said:

"We certainly can not justify the holding of forts there, much less the recapturing of those which have been taken, unless we intend to reduce those States themselves into subjection. I take it for granted, no man will deny the proposition, that whoever permanently holds Charleston and South Carolina is entitled to the possession of Fort Sumter. Whoever permanently holds Pensacola and Florida is entitled to the possession of Fort Pickens. Whoever holds the States in whose limits those forts are placed is entitled to the forts themselves, unless there is something peculiar in the location of some particular fort that makes it important for us to hold it for the general defense of the whole country, its commerce and interests, instead of being useful only for the defense of a particular city or locality. It is true that Forts Taylor and Jefferson, at Key West and Tortugas, are so situated as to be essentially national, and therefore important to us without reference to our relations with the seceded

States. Not so with Moultrie, Johnson, Castle Pinckney, and Sumter, in Charleston Harbor; not so with Pulaski, on the Savannah River; not so with Morgan and other forts in Alabama; not so with those other forts that were intended to guard the entrance of a particular harbor for local defense.

"We can not deny that there is a Southern Confederacy, *de facto*, in existence, with its capital at Montgomery. We may regret it. I regret it most profoundly; but I can not deny the truth of the fact, painful and mortifying as it is. . . . I proclaim boldly the policy of these with whom I act. We are for peace."

Mr. Douglas, in urging the maintenance of *peace* as a motive for the evacuation of the forts, was no doubt aware of the full force of his words. He knew that their continual occupation was virtually a declaration of war.

The General-in-Chief of the United States Army, also, it is well known, urgently advised the evacuation of the forts. But the most striking protest against the coercive measures finally adopted was that of Major Anderson himself. The letter in which his views were expressed has been carefully suppressed in the partisan narratives of that period and well nigh lost sight of, although it does the highest honor to his patriotism and integrity. It was written on the same day on which the announcement was made to Governor Pickens of the purpose of the United States Government to send supplies to the fort, and is worthy of reproduction here. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 282.*

Mr. Davis sets out the whole letter which shows that Major Anderson opposed attempting to hold the fort. The last clause of the letter is as follows:

"We shall strive to do our duty, though I frankly say that my heart is not in this war, which I see is to be thus commenced. That God will still avert it, and cause us to resort to pacific means to maintain our rights, is my ardent prayer!

"I am, Colonel, very respectfully,

"Your obedient servant,

"ROBERT ANDERSON,

"Major 1st Artillery, Commanding."

*Davis on The Rise and Fall of The Confederate Government, Vol. I, 284.*

The following courteous but awful potential letters followed:

Headquarters Provisional Army, C. S. A.,

"Charleston, S. C., April 11, 1861, 2 P. M.

"Sir: The Government of the Confederate States has hitherto foreborne from any hostile demonstration against Fort Sumter, in the hope that the Government of the United States, with a view to the adjustment of all questions between the two Governments, and to avert the calamities of war, would voluntarily evacuate it. There was reason at one time to believe that such would be the course pursued by the

Government of the United States; and, under that impression my Government has refrained from making any demand for the surrender of the fort.

"But the Confederate States can no longer delay assuming actual possession of a fortification commanding the entrance of one of their harbors, and necessary to its defense and security.

"I am ordered by the Government of the Confederate States to demand the evacuation of Fort Sumter. My aides, Colonel Chestnut and Captain Lee, are authorized to make such demand of you. All proper facilities will be afforded for the removal of yourself and command, together with company arms and property, and all private property, to any post in the United States which you may elect. The flag which you have upheld so long and with so much fortitude, under the most trying circumstances, may be saluted by you on taking it down.

"Colonel Chestnut and Captain Lee will, for a reasonable time, await your answer.

"I am, sir, very respectfully, your obedient servant,

"G. T. BEAUREGARD,

"Brigadier-General, commanding.

"MAJOR ROBERT ANDERSON,

"Commanding at Fort Sumter, Charleston Harbor, S. C."

"Headquarters Fort Sumter, S. C., April 11, 1861.

"General: I have the honor to acknowledge the receipt of your communication demanding the evacuation of this fort; and to say in reply thereto that it is a demand with which I regret that my sense of honor and of my obligations to my Government prevents my compliance.

"Thanking you for the fair, manly, and courteous terms proposed, and for the high compliment paid me,

"I am, General, very respectfully, your obedient servant,

"ROBERT ANDERSON,

"Major U. S. Army, commanding."

*Davis on the Rise and Fall of the Confederate Government, Vol. I, 286.*

Mr. Davis thus speaks of the bombardment:

The bloodless bombardment and surrender of Fort Sumter occurred on April 13, 1861. The garrison was generously permitted to retire with the honors of war. The evacuation of that fort, commanding the entrance to the harbor of Charleston, which, if in hostile hands, was destructive to its commerce, had been claimed as the right of South Carolina. The voluntary withdrawal of the garrison by the United States Government had been considered, and those best qualified to judge believed it had been promised. Yet, when instead of the fulfillment of just expectations, instead of the withdrawal of the garrison, a hostile expedition was organized and sent forward, the urgency of the case required its reduction before it should be re-enforced. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 297.*



### History of Slavery

Mr. Webster in his famous speech in the Senate of the United States in 1850, which speech is denominated "The Constitution and The Union," says this as to the origin of slavery:

We all know, sir, that slavery has existed in the world from time immemorial. There was slavery in the earliest periods of history, among the Oriental nations. There was slavery among the Jews; the theocratic government of that people issued no injunction against it. There was slavery among the Greeks; and the ingenious philosophy of the Greeks found, or sought to find, a justification for it exactly upon the same grounds which have been assumed for such a justification in this country; that is, a natural and original difference among the races of mankind, and the inferiority of the black or colored race to the white. The Greeks justified their system of slavery upon that idea, precisely. They held the African and some of the Asiatic tribes to be inferior to the white race; but they did not show, I think, by any close process of logic, that, if this were true, the more intelligent and the stronger had therefore a right to subjugate the weaker.

The more manly philosophy and jurisprudence of the Romans placed the justification of slavery on entirely different grounds. The Roman jurist, from the first and down to the fall of the empire, admitted that slavery was against the natural law, by which, as they maintained, all men, of whatsoever clime, color, or capacity, were equal; but they justified slavery, first, upon the ground and authority of the law of nations, arguing, and arguing truly, that at that day the conventional law of nations admitted that captives in war, whose lives, according to the notions of the times, were at the absolute disposal of the captors, might, in exchange for exemptions from death, be made slaves for life, and that such servitude might descend to their posterity. The jurists of Rome also maintained, that, by the civil law, there might be servitude or slavery, personal and hereditary; first, by the voluntary act of an individual, who might sell himself into slavery; secondly, by his being reduced into a state of slavery by his creditors, in satisfaction of his debts; and, thirdly, by being placed in a state of servitude or slavery for crime. At the introduction of Christianity, the Roman world was full of slaves, and I suppose there is to be found no injunction against that relation between man and man in the teachings of the Gospel of Jesus Christ or of any of his Apostles. The object of the instruction imparted to mankind by the founder of Christianity was to touch the heart, purify the soul, and improve the lives of individual men. That object went directly to the first fountain of all the political and social relations of the human race, as well as of all true religious feelings, the individual heart and mind of man. *5 Webster's Works, (7th ed.), pp. 329-330.*

Slavery does exist in the United States. It did exist in the States before the adoption of this Constitution, and at that time. Let us, therefore, consider for a moment what was the state of sentiment,

North and South, in regard to slavery, at the time this Constitution was adopted. A remarkable change has taken place since; but what did the wise and great men of all parts of the country think of slavery then? In what estimation did they hold it at the time when this Constitution was adopted? It will be found, sir, if we will carry ourselves by historical research back to that day, and ascertain men's opinions by authentic records still existing among us, that there was then no diversity of opinion between the North and the South upon the subject of slavery. It will be found that both parts of the country held it equally an evil, a moral and political evil. It will be found that, either at the North or at the South, there was not much, though there was some, invective against slavery as inhuman and cruel. The great ground of objection to it was political; that it weakened the social fabric; that, taking the place of free labor, society became less strong and labor less productive; and therefore we find from all the eminent men of the time the clearest expression of their opinion that slavery is an evil. They ascribed its existence here, not without truth, and not without some acerbity of temper and force of language, to the injurious policy of the mother country, who, to favor the navigator, had entailed these evils upon the Colonies. *5 Webster's Works, (7th ed.), p. 333.*

You observe, sir, that the term *slave*, or *slavery*, is not used in the Constitution. The Constitution does not require that "fugitive slaves" shall be delivered up. It requires that persons held to service in one State, and escaping into another, shall be delivered up. Mr. Madison opposed the introduction of the term *slave*, or *slavery*, into the Constitution; for he said that he did not wish to see it recognized by the Constitution of the United States that there could be property in men. *5 Webster's Works, (7th ed.), p. 334.*

In the excited times in which we live, there is found to exist a state of crimination and recrimination between the North and South. There are lists of grievances produced by each; and those grievances, real or supposed, alienate the minds of one portion of the country from the other, exasperate the feelings, and subdue the sense of fraternal affection, patriotic love, and mutual regard. I shall bestow a little attention, sir, upon these various grievances existing on the one side and on the other. I begin with complaints of the South. I will not answer, further than I have, the general statements of the honorable Senator from South Carolina, that the North has prospered at the expense of the South in consequence of the manner of administering this government, in the collecting of its revenues, and so forth. These are disputed topics, and I have no inclination to enter into them. But I will allude to other complaints of the South, and especially to one which has in my opinion just foundation; and that is, that there has been found at the North, among individuals and among legislators, a disinclination to perform fully their constitutional duties in regard to the return of persons bound to service who have escaped into the free States. In that respect the South, in my judgment, is right, and the North is wrong. *5 Webster's Works, (7th ed.), pp. 353-4.*

I repeat, therefore, sir, that here is a well-founded ground of complaint against the North, which ought to be removed, which it is now in the power of the different departments of this government to remove; which calls for the enactment of proper laws authorizing the judicature of this government, in the several States to do all that is necessary for the recapture of fugitive slaves and for their restoration to those who claim them. Wherever I go, and whenever I speak on the subject,—and when I speak here I desire to speak to the whole North,—I say that the South has been injured in this respect, and has a right to complain; and the North has been too careless of what I think the Constitution peremptorily and emphatically enjoins upon her as a duty. *5 Webster's Works, (7th ed.), p. 355.*

Indeed, in the colonial period no little repugnance had been manifested to the introduction of slaves; and though the people of the colonies were far from being blameless in the matter, the guilt of the slave trade rested principally upon the mother country, whose government had authorized and protected it, and as a matter of state policy had refused its assent to the measures proposed by the colonies to check it. Those measures were adopted with a view to the ultimate extinction of the institution; and the refusal to sanction them was among the grave complaints made against the royal government which Mr. Jefferson<sup>1</sup> would have introduced into the indictment incorporated in the declaration of independence. *Story on the Constitution, Vol. V, p. 660, § 1916.*

President Davis thus gives the origin of slavery in the United States:

It is well known that, at the time of the adoption of the Federal Constitution, African servitude existed in all the States that were parties to that compact, unless with the single exception of Massachusetts, in which it had, perhaps, very recently ceased to exist. The slaves, however, were numerous in the Southern, and very few in the Northern, States. This diversity was occasioned by differences of climate, soil, and industrial interests—not in any degree by moral considerations, which at that period were not recognized as an element in the question. It was simply because negro labor was more profitable in the South than in the North that the importation of negro slaves had been, and continued to be, chiefly directed to the Southern ports. For the same reason slavery was abolished by the States of the Northern section (though it existed in several of them for more than fifty years after the adoption of the Constitution), while the importation of slaves into the South continued to be carried on by Northern merchants and Northern ships, without interference in the traffic from any quarter, until it was prohibited by the spontaneous action of the Southern States themselves.

Two petitions for the abolition of slavery and slave-trade were presented February 11 and 12, 1790, to the very first Congress convened

<sup>1</sup>Mr. Jefferson wrote two counts into the first draft of the Declaration of Independence, charging King George and Parliament of instituting and perpetuating slavery in the Colonies.

They were however both stricken from the draft before it was adopted, which constituted the chief change in the instrument from the one Mr. Jefferson first drafted.

under the Constitution. After full discussion in the House of Representatives, it was determined, with regard to the first-mentioned subject, "that Congress have no authority to interfere in the emancipation of slaves, or in the treatment of them within any of the States;" and, with regard to the other, that no authority existed to prohibit the migration or importation of such persons as the States might think proper to admit, "prior to the year 1808." So distinct and final was the statement of the limitations of the authority of Congress considered to be that, when a similar petition was presented two or three years afterward, the Clerk of the House was instructed to return it to the petitioner.

In 1807, Congress, availing itself of the very earliest moment at which the constitutional restriction ceased to be operative, passed an act prohibiting the importation of slaves into any part of the United States from and after the first day of January, 1808. This act was passed with great unanimity. In the House of Representatives there were one hundred and thirteen (113) yeas to five (5) nays; and it is a significant fact, as showing the absence of any sectional division of sentiment at that period, that the five dissentients were divided as equally as possible between the two sections: two of them were from Northern and three from Southern States. *Davis on The Rise and Fall of the Confederate Government, Vol. I, 5.*

Virginia, it is well known, in the year 1784, ceded to the United States—then united only by the original Articles of Confederation—her vast possessions of the Ohio, from which the great States of Ohio, Indiana, Michigan, Illinois, Wisconsin, and part of Minnesota, have since been formed. In 1787—before the adoption of the Federal Constitution—the celebrated "Ordinance" for the government of this Northwestern Territory was adopted by the Congress, with the full consent, and indeed at the express instance, of Virginia. This Ordinance included six definite "Articles of compact between the original States and the people and States in the said Territory," which were to "forever remain unalterable unless by common consent." The sixth of these articles ordains that "there shall be neither slavery nor involuntary servitude in the said Territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted." *Davis on The Rise and Fall of the Confederate Government, Vol. I, 7.*

Montesquieu says:

Were I to vindicate our right to make slaves of the Negroes, these should be my arguments.

The Europeans, having extirpated the Americans, were obliged to make slaves of the Africans, for clearing such vast tracts of land.

Sugar would be too dear, if the plants which produce it were cultivated by any other than slaves.

These creatures are all over black, and with such a flat nose, that they can scarcely be pitied.

It is hardly to be believed that God, who is a wise being, should place a soul, especially a good soul, in such a black, ugly body. *Montesquieu's Works, Book XV, Chapter V.*



There is another origin of the right of slavery, and even of the most cruel slavery which is to be seen among men.

There are countries where the excess of heat enervates the body, and renders men so slothful and dispirited, that nothing but the fear of chastisement can oblige them to perform any laborious task of duty; slavery is there more reconcilable to reason; and the master being lazy, with respect to his sovereign, as his slave is, with regard to him, this adds a political to a civil slavery.

Aristotle endeavors to prove, that there are natural slaves; but what he says is far from proving it. If there be any such, I believe they are those of whom I have been speaking.

But, as all men are born equal, slavery must be accounted unnatural, though, in some countries, it be founded on natural reason; and a wide difference ought to be made betwixt such countries and those in which even natural reason rejects it, as in Europe, where it has been so happily abolished.

Plutarch, in the life of Numa, says, that, in Saturn's time, there was neither slave nor master. Christianity has restored that age in our climates. *Montesquieu's Works, Book XV, Chapter VII.*

### Constitutional History of Slavery

Mr. Calhoun thus gives the history :

The difference of opinion and feeling in reference to the relation between the two races disclosed itself in the Convention that framed the Constitution, and constituted one of the greatest difficulties in forming it. After many efforts, it was overcome by a compromise, which provided in the first place, that representatives and direct taxes shall be apportioned among the States according to their respective numbers; and that, in ascertaining the number of each, five slaves shall be estimated as three. In the next, that slaves escaping into States where slavery does not exist, shall not be discharged from servitude, but shall be delivered up on claim of the party to whom their labor or service is due. In the third place, that Congress shall not prohibit the importation of slaves before the year 1808; but a tax not exceeding ten dollars may be imposed on each imported. And finally, that no capitation or direct tax shall be laid, but in proportion to federal numbers; and that no amendment of the Constitution, prior to 1808, shall affect this provision, nor that relating to the importation of slaves.

It was well understood at the time, that without them the Constitution would not have been adopted by the Southern States, and of course that they constituted elements so essential to the system that it never would have existed without them. The Northern States, knowing all this, ratified the Constitution, thereby pledging their faith, in the most solemn manner, sacredly to observe them.

The above views were almost in words confirmed and decreed by the Supreme Court of the United States, the opinion being written by Justice Story, who was a citizen of Massachusetts, and not in sympathy with the slave-holding States. In the case of *Prigg v. Pa.*, it is said :

"The full recognition of this right and title was indispensable to the security of this species of property, in all the slave-holding States, and, indeed, was so vital to the preservation of their interests and institutions, that it cannot be doubted, that it constituted a fundamental article without the adoption of which the Union would not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non-slave-holding States, by preventing them from intermeddling with, or restricting, or abolishing the rights of the owners of slaves."

"The clause was therefore of the last importance to the safety and security of the Southern States, and could not be surrendered by them without endangering their whole property in slaves. The clause was accordingly adopted in the Constitution by the unanimous consent of the framers of it—a proof at once of its intrinsic and practical necessity."

"The clause manifestly contemplates the existence of a positive unqualified right on the part of the owner of the slave, which no State law or regulation can in any way regulate, control, qualify, or restrain."

No trouble from this provision of the Constitution appears to have arisen until the year 1819, when the admission of Missouri into the Union was sought, and the question first became acute, whether it should be admitted as a slave-holding or non-slave-holding State. The difference was settled by an Act of Congress known as the Missouri Compromise Act, which admitted the State as a slave-holding State, but provided that all of the territory of the United States lying North of 36° 30' N. latitude, should be non-slave-holding territory, and that no State carved out of such territory could be admitted into the Union, *except as a non-slave-holding State*. This was at the time thought to forever settle the slave question, but it had the opposite effect. It proved to be the entering wedge, which was to split the Union in twain. It made a geographical division in the politics, and parties of the country, which as Mr. Jefferson and Mr. Madison had predicted, was inconsistent with a Republican form of government. A Republic can stand a division into two political parties if they are not necessary to its healthy condition, but cannot exist peaceably as a whole, if the parties are divided by geographical lines. War and force is the necessary result, and in the end the weaker must yield to the force of the stronger; such was predicted by the two sages, Jefferson and Madison, and such was the sad result. The Compromise Act was declared unconstitutional by the Supreme Court of the United States in the opinion of the Dred Scott decision, but the majority of the people in the Northern States would not consent to be bound by the decision and many of the Northern States declined to abide by it, or even the construction placed on the Constitution by the Court, or even that placed on it by the leading Statesmen of the Northern States, including even Mr. Webster and Mr. Lincoln. The people of the Northern States, aided and encouraged by foreign capital, organized secret societies, whose objects and purposes were to entice, decoy, entrap, inveigle, and seduce slaves to escape from their owners, and to

pass them secretly and rapidly, by means organized for the purpose, into Canada, where they will be beyond the reach of the provision. *6 Calhoun's Works, p. 296.*

About the year 1835, there arose a political party known as the Abolition party. Its chief object was to force emancipation on the South, by uniting with the North against slavery, and by this perversion of the constitution every possible means were resorted to to render the whole South and Southern people aliens and hateful to the North. To this end they established social and religious societies, established newspapers, employed lanterns and issued pictorial publications, and flooded Congress with petitions to abolish slavery. Their acts became so offensive and seditious to the government, that the President requested Congress to provide laws to punish and prevent their acts of sedition; but Congress failed to so provide. While the political piety was never strong enough to come into power, it did become strong enough to hold the balance of power, and hence made of the great leading parties, power to its doctrines and teachings, so far as they could without alienating the majority of their own followers. It, as a party, never professed to be willing to submit to the Constitutional or Statutory provisions as to slavery, it openly opposed both, and absolutely resisted the law by force. When the question of the admission of Texas came up in the forties, the question again became acute in Congress, because it was thought that if Texas was admitted it would be admitted as a slave state, and tend to destroy the power of the non-slave States in Congress. The question was again fanned into flames when California and Oregon were admitted as non-slave States. This was followed by acts abolishing slavery in the district of Columbia, and in all territorial governments of the United States. To add fuel to the flames, Congress had and was continuing to pass protective tariff acts, which were also because of geographical conditions, exclusively for the benefit of the Northern States and their people, and a heavy tax burden on the Southern States and their people. Some of the Southern States refused to be bound by these laws, as did some of the Northern States and people refuse to abide by the Constitution and Statutes as to slavery. The two things concurring to make a geographical division between the States, secession was inevitable, when the constitutional rights of the minority were wholly denied and disregarded by the majority. The result would have been the same if the Southern States had acquired the controlling majority.

In 1839 Mr. Clay thus classified the opponents of slavery:

There are three classes of persons opposed, or apparently opposed, to the continued existence of slavery in the United States. The first are those who, from sentiments of philanthropy and humanity, are conscientiously opposed to the existence of slavery, but who are no less opposed, at the same time, to any disturbance of the peace and tranquillity of the union, or the infringement of the powers of the states composing the confederacy. In this class may be comprehended that peaceful and exemplary society of "Friends," one of whose established maxims is an abhorrence of war in all its forms, and the cultivation of peace and good will among mankind. The next class con-

sists of apparent abolitionists; that is, those who, having been persuaded that the right of petition has been violated by Congress, cooperate with the abolitionists for the sole purpose of asserting and vindicating that right. And the third class are the real ultra-abolitionists, who are resolved to persevere in the pursuit of their object at all hazards, and without regard to any consequences, however calamitous they may be. With them the rights of property are nothing; the deficiency of the powers of the general government is nothing; the acknowledged and incontestable powers of the states are nothing; civil war, a dissolution of the Union, and the overthrow of a government in which are concerned the fondest hopes of the civilized world, are nothing. A single idea has taken possession of their minds, and onward they pursue it, overlooking all barriers, reckless and regardless of all consequences. *1 Clay, pp. 198-9.*

Abolition should no longer be regarded as an imaginary danger. The abolitionists, let me suppose, succeed in their present aim of uniting the inhabitants of the free states, as one man, against the inhabitants of the slave states. Union on the one side will beget union on the other. And this process of reciprocal consolidation will be attended with all the violent prejudices, embittered passions, and implacable animosities, which ever degraded or deformed human nature. A virtual dissolution of the Union will have taken place, while the forms of its existence remain. The most valuable element of union, mutual kindness, the feelings of sympathy, the fraternal bonds, which now happily unite us, will have been extinguished forever. One section will stand in menacing and hostile array against the other. The collision of opinion will be quickly followed by the clash of arms. *1 Clay, p. 205.*

The inhabitants of the slave states are sometimes accused by their Northern brethren with displaying too much rashness and sensibility to the operations and proceedings of abolitionists. But before they can be rightly judged, there should be a reversal of conditions. Let me suppose that the people of the slave states were to form societies, subsidizing presses, make large pecuniary contributions, send forth numerous missionaries throughout all their own borders, and enter into machinations to burn the beautiful capitols, destroy the productive manufactories, and sink in the ocean the gallant ships of the Northern States. Would these incendiary proceedings be regarded as neighborly and friendly, and consistent with the fraternal sentiments which should ever be cherished by one portion of the Union towards another? Would they excite no emotion? occasion no manifestations of dissatisfaction? nor lead to any acts of retaliatory violence? But the supposed case falls far short of the actual one in most essential circumstances. In no contingency could these capitols, manufactories, and ships, rise in rebellion, and massacre inhabitants of the Northern States. *1 Clay, p. 206.*

Mr. Madison thus gives a history of the subject:

As to the intention of the framers of the Constitution in the clause relating to "the migration and importation of persons," etc., the best key may, perhaps, be found in the case which produced it. The Afri-



can trade in slaves had long been odious to most of the States, and the importation of slaves into them had been prohibited. Particular States, however, continued the importation, and were extremely averse to any restriction on their power to do so. In the convention, the former States were anxious in framing a new constitution, to insert a provision for an immediate and absolute stop to the trade. The latter were not only averse to any interference on the subject, but solemnly declared that their constituents would never accede to a Constitution containing such an article. Out of this conflict grew the middle measure, providing that Congress should not interfere until the year 1808; with an implication, that after that date they might prohibit the importation of slaves into the States then existing, and previous thereto, into the States not then existing. *3 Writings of Madison, pp. 149-150.*

But some of the States were not only anxious for a Constitutional provision against the introduction; they had scruples against admitting the term "slaves" into the instrument. Hence the descriptive phrase, "migration or importation of persons," the term migration allowing those who were scrupulous of acknowledging expressly a property in human beings to view *imported* persons as a species of emigrants, while others might apply the term to foreign malefactors sent or coming into the country. It is possible, though not recollected, that some might have had an eye to the case of freed blacks as well as malefactors.

But, whatever may have been intended by the term "migration," or the term "persons," it is most certain that they referred exclusively to a migration or importation from other countries into the United States, and not to a removal, voluntary or involuntary, of slaves or freemen from one to another part of the United States. *3 Writings of Madison, p. 150.*

Neither is there any indication that Congress have heretofore considered themselves as deriving from this clause a power over the migration or removal of individuals, whether freemen or slaves, from one State to another, whether new or old. For it must be kept in view, that if the power was given at all, it has been in force eleven years over all the States existing in 1808, and at all times over the States not then existing. Every indication is against such a construction by Congress of their constitutional powers. Their alacrity in exercising their powers relating to slaves is a proof that they did not claim what they did not exercise. They punctually and unanimously put in force the power accruing in 1808, against the farther importation of slaves from abroad. They had previously directed their power over American vessels on the high seas against the African trade. They lost no time in applying the prohibitory power to Louisiana, which having maritime ports, might be an inlet for slaves from abroad. But they forbore to extend the prohibition to the introduction of slaves from other parts of the Union. They had even prohibited the importation of slaves into the Mississippi Territory

from without the limits of the United States, in the year 1798, without extending the prohibition to the introduction of slaves from *within those limits*; although, at the time, the ports of Georgia and South Carolina were open for the importation of slaves from abroad, and increasing the mass of slavery within the United States. *3 Writings of Madison, pp. 151-152.*

As to the power of admitting new States into the federal compact, the questions offering themselves are: whether Congress can attach conditions, or the new States concur in conditions, which, after admission, would abridge or *enlarge* the constitutional rights of legislation common to the other States; whether Congress can, by a compact with a new member, take power either to or from itself, or place the new member above or below the equal rank and rights possessed by the others; whether all such stipulations, expressed or implied, would not be nullities, and so pronounced when brought to a practical test. It falls within the scope of your inquiry to state the fact that there was a proposition in the convention to discriminate between the old and new States, by an article in the Constitution declaring that the aggregate number of representatives from the States thereafter to be admitted should never exceed that of the States originally adopting the Constitution. The proposition, happily, was rejected. The effect of such a discrimination is sufficiently evident. *3 Writings of Madison, p. 153.*

Mr. Madison and Mr. Jefferson foresaw that the Missouri Compromise would tend to danger of disrupting the Union, by a geographical division of parties, and Madison said:

Under one aspect of the general subject, I cannot avoid saying, that, apart from its merits under others, the tendency of what has passed and is passing fills me with no slight anxiety. Parties, under some denominations or other, must always be expected in a government as free as ours. When the individuals belonging to them are intermingled in every part of the whole country, they strengthen the union of the whole while they divide every part. Should a state of parties arise founded on geographical boundaries, and other physical and permanent distinctions which happen to coincide with them, what is to control those great repulsive masses from awful shocks against each other? *2 Writings of Madison, pp. 156-7.*

The following are the views of Mr. Webster as to the Constitutional provisions and acts of Congress as to fugitive slaves:

This provision of the Constitution seems to have met with little exception or opposition, or none at all, so far as I know, in Massachusetts. Everybody seems to have regarded it as necessary and proper. The members of the convention of that State for adopting the

<sup>1</sup>The prophecy of Jefferson and Madison came true. Slavery could not continue or be abolished, except by force, when by written law, it was

made a sectional as well as political issue. Law proved to be the servant of sectional politics.

Constitution were particularly jealous of every article and section which might in any degree intrench on personal liberty. Every page of their debates evinces this spirit. And yet I do not remember that any one of them found the least fault with this provision. *6 Webster's Works, (7th ed.), p. 552.*

On the 12th of February, 1793, under the administration of General Washington, Congress passed an act for carrying into effect both these clauses of the Constitution. It is entitled, "An Act respecting fugitives from justice, and persons escaping from the service of their masters." *6 Webster's Works, (7th ed.), p. 553.*

It will be observed, that in neither of the two cases does the law provide for the trial of any question whatever by jury, in the State in which the arrest is made. The fugitive from justice is to be delivered, on the production of an indictment, or a regular affidavit, charging the party with having committed the crime; and the fugitive from service is to be removed to the State from which he fled, upon proof, before any authorized magistrate, in the State where he may be found, either by witnesses or affidavit, that the person claimed doth owe service to the party claiming him, under the laws of the State from which he fled. In both cases, the proceeding is to be preliminary and summary; in both cases, the party is to be removed to the State from which he fled, that his liabilities, and his rights, may be there regularly tried and adjudged by the tribunals of that State, according to its laws. *6 Webster's Works, (7th ed.), pp. 554-5.*

I am not aware that there exists any published account of the debates on the passage of this act. I have been able to find none. I have searched the original files, however, and I find among the papers several propositions for modifications and amendments, of various kinds; but none suggesting the propriety of any jury trial in the State where the party should be arrested.

For many years, little or no complaint was made against this law, nor was it supposed to be guilty of the offenses and enormities which have since been charged upon it. It was passed for the purpose of complying with a direct and solemn injunction of the Constitution; it did no more than was believed to be necessary to accomplish that single purpose; and it did that in a cautious, mild manner, to be everywhere conducted according to judicial proceedings.

I confess I see no more objection to the provisions of this law than was seen by Mr. Cabot and Mr. Strong, Mr. Goodhue and Mr. Gerry; and such provisions appear to me, as they appeared to them, to be absolutely necessary, if we mean to fulfill the duties positively and peremptorily enjoined upon us by the Constitution of the country. But since the agitation caused by Abolition societies and Abolition presses has to such an extent excited the public mind, these provisions have been rendered obnoxious and odious. Unwearied endeavors have been made, and but too successfully, to rouse the passions of the people against them; and under the cry of universal freedom, and under that other cry, that there is a rule for the government of public men

and private men which is of superior obligation to the Constitution of the country, several of the States have enacted laws to hinder, obstruct, and defeat the enactments in this act of Congress, to the utmost of their power.<sup>1</sup> *6 Webster's Works, (7th ed.), p. 556.*

The Constitution declares, that in all criminal prosecutions there shall be a trial by jury; the reclaiming of a fugitive slave is not a criminal prosecution. The Constitution also declares that in suits at common law the trial by jury shall be preserved; the reclaiming of a fugitive slave is not a suit at the common law. And there is no other clause or sentence in the Constitution having the least bearing on the subject. *6 Webster's Works, (7th ed.), p. 558.*

Mr. Bryce in his work on the American Constitution, after stating that the Constitution, prior to the thirteenth amendment, not only authorized but protected slavery, says on this subject:

Stripped of legal technicalities, the dispute resolved itself into the problem often purposed but capable of no general solution: When is a majority entitled to use force for the sake of retaining a minority in the same political body with itself? To this question, when it appears in a concrete shape, as to the similar question when an insurrection is justifiable, an answer can seldom be given beforehand. The result decides. When treason prospers, none dare call it treason.

The Constitution, which had rendered many services to the American people, did them an inevitable dis-service when it fixed their minds on the legal aspects of the question. Law was meant to be the servant of politics, and not be suffered to become the master. A case had arisen which its formulæ were unfit to deal with, a case which had to be settled on large moral and historical grounds. It was not merely the superior physical force of the North that prevailed; it was the moral forces which rule the world, forces which had long worked against slavery, and were ordained to save North America from the course of hostile nations established side by side. *Bryce's American Commonwealth, Vol. I, 410.*

In the uncertainty as to where legal right resided, it would have been prudent to consider where physical force resided. The South, however, thought herself able to resist any physical force which the rest of the nation might bring against her. Thus encouraged, she took

<sup>1</sup>Public opinion changed on this subject. The majority of the masses in the Northern, Eastern and Western States were not willing to obey the Constitution nor to follow the teaching of their great leaders such as Story, Shaw, Webster, Lincoln and others. They resolved to resist the enforcement of the Constitution and statutes on the subject. The Constitution and Federal statutes on the subject, though held valid and binding by the greatest courts, judges and statesmen in the world, were denounced in the public assemblies, and even in pulpits, by the greatest divines, as a league with hell, and a compact with the devil. Sectional feeling was intense. The North-

ern press was subsidized, millions of people rebelled against the constitutional provisions as to slavery; some states nullified acts of Congress, and resisted the enforcement of Federal laws on the subject of slavery. A great part of the Northern people and some of the Northern States were in a state of rebellion against the Federal Government and its laws, as much so as ever was the Southern States. Had this element failed in getting control of the Federal Government, there can be but little doubt, but many of the Northern States would have seceded as did the Southern States when the abolitionists gained control.



her stand on the doctrine of States Rights; and then followed a pouring out of blood and treasure such as was never spent on determining a point of law before, not even when Edward III, and his successors waged war for a hundred years to establish the claim of females to inherit the crown of France.

What, then, do the rights of a State now include? Every right or power of a Government except:

The right of secession (not abrogated in terms, but admitted since the war to be no longer claimable. It is expressly negatived in the recent Constitutions of several of the Southern States.)

Powers which the Constitution withholds from the States (including that of intercourse with foreign government).

Powers which the Constitution expressly confers on the Federal Government.

As respects some powers of the last class, however, the States may act concurrently with, or in default of action by, the Federal Government. It is only from contravention of its action that they must abstain. *Bryce's American Commonwealth, Vol. I, 411.*

The institution of African slavery as it existed in about half the States of the Union, and the contests pervading the public mind for many years between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort on the part of most of the States in which slavery existed to separate from the Federal government and to resist its authority. This constituted the war of the rebellion; and whatever auxiliary causes may have contributed to bring about the war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle, slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. *Story on the Constitution, Vol. V, p. 724, Appendix.*

The author of the above note is hardly justified in his conclusion that the Southern States ever desired additional safeguards for the perpetuation of slavery or its security. They only asked that the Constitutional provisions and the existing statutes on the subject be observed and enforced by the States and Federal governments. One of the Southern States did resist the enforcement of a Federal statute as to a protective tariff, but no one of them ever did resist any Federal law as to slavery. It was the Northern States which resisted and refused to obey or enforce the Federal laws, Constitution and statutes as to slavery.

The Constitution inhibited Congress from prohibiting the importation of slaves into the States until the year 1808; by act of Congress March 2, 1807, the importation was prohibited, on and after June 1st, 1808, but this prohibition extended only

to importation from foreign countries, and not from one State to another. Slavery was never legally prohibited in the slave states until the 13th Amendment was adopted.

This act of 1807 was passed by Congress during Mr. Jefferson's administration and was approved by him, and his entire Cabinet; and was advised and passed at the earliest possible time which the Constitution would allow. It was then people and companies in Europe and the Eastern States that were engaged in the importation of slaves, and not the Southern States, nor the people thereof.

The Constitution prior to the Thirteenth Amendment, unquestionably secured the Southern States against the abolition of slavery, and expressly provided for the return of fugitive slaves to their owners. It also prevented Congress from imposing discriminating taxes against slaves. Many of the Northern States were averse to the Constitution on this account. Many of the leading citizens of the Northern States were not willing to be so bound or for the States to be so bound by the Constitution. They openly advocated disregarding the Constitution on this subject. The Constitutional provisions provoked the famous speech of Wendell Philips, in which he declared "The Constitution is a compact with hell. God damn the Constitution of the United States." These were the sentiments of a large portion of the citizens of the Northern States; they were known as Abolitionists, and while as a party they were never successful, yet by uniting and fusing themselves with any party that opposed any measure that looked favorably towards slavery, they ultimately succeeded in forcing the Southern States to secede. If the Southern States had not divided among themselves as to candidates in 1860, and had succeeded in electing a President, and a majority of Congress in 1860, it is very probable that some of the Northern States would have seceded. It was perfectly evident that secession would follow this election.

Mr. Foster, a Northern Author, thus speaks of the subject and conditions:

The election by the Northern States, for President, of a Northern man who had said that the Union could not "endure permanently half slave, half free," and who had publicly declared his refusal to acquiesce in the opinion in the Dred Scott Case, that slavery could not be constitutionally excluded from the Territories, convinced the South that new safeguards were necessary for the preservation of their peculiar institution. Renewed threats of a dissolution of the Union were

received in such a manner by the North as to make it clear that a majority of the people were resolved to submit to no further aggressions by the slave power. *Foster on the Constitution, Vol. I, p. 163.*

Alexander H. Stephens, the Vice-President of the Confederacy, in his *Constitutional View of the War between the States*, vol. ii, p. 321, says:

The truth is, in my judgment, the wavering scale in Georgia was turned by a sentiment, the key-note to which was given in the words, "We can make better terms out of the Union than in it." It was Mr. Thomas R. R. Cobb, who gave utterance to this key-note, in his speech before the Legislature two days before my address before the same body. This one idea did more, in my opinion, in carrying the State out, than all the arguments and eloquence of all the others combined. Two-thirds, at least, of those who voted for the Ordinance of Secession, did so, I have but little doubt, with a view to a more certain Reformation of the Union.

And again speaking of Lincoln's proclamation, calling for troops (*ibid.*, p. 356):

"The effect of this upon the public mind of the Southern States cannot be described or even estimated. The shock was not unlike that produced by great convulsions of nature. . . . the upheavings and rockings of the earth itself! It was not that of fright. Far from it! But a profound feeling of wonder and astonishment! Up to this time, a majority, I think, of even those who had favored the policy of secession, had done so under the belief and conviction that it was the surest way of securing a redress of grievances, and of bringing the Federal Government back to constitutional principles. Many of them indulged hopes that a Re-formation, or a Re-construction of the Union would soon take place on the basis of the new Montgomery Constitution, and that the Union, under this, would be continued and strengthened or made more perfect, as it had been in 1789, after the withdrawal of nine States from the first Union, and the adoption of the Constitution of 1787. This proclamation dispelled all such hopes." He says again that when South Carolina attacked Fort Sumter, Lincoln should have called a Congress of the States which had not seceded, to consult them upon his action in the matter. *Foster on the Constitution, Vol. I, (note), p. 170.*

Stephens gives the following testimony concerning the attitude of Jefferson Davis: "I never saw a word from him recommending secession as the proper remedy against threatening danger until he joined in the general letter of the Southern Senators and Representatives in Congress to their States advising them to take that course. This was in December, 1860, and not until after it was ascertained in the Committee of the Senate, on Mr. Crittenden's proposition for quieting the apprehensions and alarm of the Southern States, from the accession of Mr. Lincoln to power, that the Republicans, his supporters, would not agree to that measure. It is well known that both he and Mr. Toombs declared their willingness to accept the adoption of Mr. Crittenden's measure as a final settle-

ment of the controversy between the States and sections, if the party coming into power would agree to it in the same spirit and with the same assurance." (Ibid., vol. i., pp. 416, 417.) See also Douglas' speech in the Senate, Jan. 3d. 1861, stating the position of Toombs and Davis at that time. (Cong. Globe, 2d Sess., 36th Congress, appendix, p. 441): Report by H. P. Bell, commissioner of Georgia to Tennessee (Journal of Georgia Convention, p. 368); article by J. D. Cox in *Atlantic Monthly* for 1892, p. 390; infra, note 56. *Foster on the Constitution, Vol. I, (note) p. 171.*

NOTE—Here was the grievous mistake of Mr. Lincoln and the Northern States. A convention of the States or the people thereof would have resulted in amending the Constitution to meet public opinion on the questions which divided the states.

Mr. Foster thus describes the beginning of secession and the war:

Lincoln's inaugural was conciliatory in its tone. He expressed willingness to approve a constitutional amendment making it forever impossible for the Federal government to interfere with slavery within a State without its consent. He further suggested that a convention of the States was the best method of preparing amendments to the Constitution. He repudiated the right of secession; and announced his determination to maintain the laws of the United States. It was well known that there was a division in his cabinet as to the right and expediency of defending the places owned by the Federal government in the seceded States; and it was the belief of the commissioners sent by the Confederate government to negotiate upon this point, that Seward had promised that Fort Sumter would be surrendered. Many of the leaders of the Republicans in the North, amongst them Horace Greeley, advised that the seceding States be permitted to depart in peace. The South still believed that when she showed she was in earnest, the North would yield; and that even if Lincoln wished to resist, he was powerless to act under existing laws. On April 12th, the militia of South Carolina, under the command of a Confederate general, fired upon Fort Sumter, which was held by a small company of the army of the United States, in Charleston harbor, without provisions to endure a seige, and within range of guns from the shore. After a short resistance to save his honor, Major Anderson two days later surrendered the fort. But the victory was indeed like one by Pyrrhus. The North roused by this blow, rose to the defense of the flag. On the 15th Lincoln called for seventy-five thousand troops to defend the Union and the governors of all the free States at once responded. The North had received the call and refused to lay down her cards. The South had too much pride to recede. Her leaders had raised a storm which it was now too late to cease; and they were carried along by the tide. *Foster on the Constitution, Vol. I, pp. 177-178.*

In 1833, Mr. Webster's opinion was asked as to the power of the States and Congress to control slavery, and in part he replied as follows:



My sentiments on this subject, my dear sir, have been often publicly expressed; but I have no objection to repeat the declaration of them, if it be thought by you that such a declaration might, in the smallest degree, aid the friends of the Union and the Constitution, in the South, in dispelling prejudices which are so industriously fostered, and in quieting agitations so unnecessarily kept alive.

In my opinion, the domestic slavery of the Southern States is a subject within the exclusive control of the States themselves; and this, I am sure, is the opinion of the whole North.<sup>1</sup> Congress has no authority to interfere in the emancipation of slaves, or in the treatment of them in any of the States. This was so resolved in the House of Representatives, when Congress sat in this city in 1790, on the report of a committee consisting almost entirely of Northern members; and I do not know an instance of the expression of a different opinion, in either house of Congress, since. *6 Webster's Works, (7th ed.), p. 536.*

Mr. Blaine thus speaks of the Constitutional Provision as to slavery:

The compromises on the slavery question, inserted in the Constitution, were among the essential conditions upon which the Federal Government was organized. If the African slave-trade had not been permitted to continue for twenty years, if it had not been conceded that three-fifths of the slaves should be counted in the apportionment of representation in Congress, if it had not been agreed that fugitives from service should be returned to their owners, the thirteen States would not have been able in 1787 to form a more perfect union. *Blaine's Twenty Years in Congress, p. 1.*

### Wilmot Proviso

The Wilmot Proviso,<sup>2</sup> was offered by Mr. Wilmot of Pennsylvania: declaring it to be "an express and fundamental condition to the acquisition of any territory from Mexico, that neither slavery nor involuntary servitude shall ever exist therein." *Blaine's Twenty Years in Congress, p. 67.*

NOTE—This proviso was clearly not authorized by the Constitution. Congress had no such power as it proposed to exercise. It was void for the same reason as was the Missouri Compromise Statute, declared void in the Dred Scott Division. The powers attempted to be asserted in these acts were reserved to the states and the Federal Government required to guarantee them to the states.

### English Sanction of Slavery

In 1840, Mr. Calhoun said in the Senate:

The whole of Hindustan, with the adjacent possessions, is one magnificent plantation, peopled by more than one hundred million of

<sup>1</sup>Mr. Webster no doubt spoke what he believed and it was the belief and feelings of the leading statesmen and jurists of the North at that time, and probably at his death; but it was not the feelings or belief of the masses

of the people of the Northern States in 1861.

<sup>2</sup>This proviso provided much debate in Congress and was a political issue. It was a renewal and extension of the Missouri compromise.

slaves, belonging to a company of gentlemen in England, called the East India Company, whose power is far more unlimited and despotic than that of any Southern planter over his slaves—a power upheld by the sword and bayonet, exacting more and leaving less by far of the product of their labor to the subject race, than is left under our own system, with much less regard to their comfort in sickness and age. 3 *Calhoun's Works*, p. 478.

Notwithstanding this fact, England or some of her leading statesmen and philanthropists, encouraged and promoted abolition societies in the United States and sought to dismember the union by driving a wedge between the Northern and Southern States, and even by taking a hand in wars between Mexico and Texas and the United States. See Mr. Calhoun's works and Presidential papers during his terms as Secretary of War.

### **European Action as to Slavery**

In 1843, there was started a world-wide movement to abolish slavery in America. The following is taken from a note to the 5th vol. of Calhoun's Works:

“In June, 1843, the World's Convention, as it was called, a body which obtained an infamous notoriety at the time, as well on account of the material of which it was composed, as of its mad and mischievous schemes, assembled in London. One of its principal objects, perhaps the only one which interested the American, or (to speak more properly) the New England delegation, was to urge on the British Government the importance of securing the abolition of slavery in Texas, as the most effectual means of involving their own country in a civil and servile war; and, finally, of dissolving the Union. To this end, they waited in a body on Lord Aberdeen, the principal Secretary of State of Foreign Affairs, and proposed that the British Government should either make a loan, based on the security of the public lands of Texas, or at least guarantee the payment of interest on such a loan, to be devoted exclusively to the abolition of slavery within its limits.”

### **Abolitionists' Activities**

In 1836, Abolition petitions were being circulated through the mails, which tended to create insurrections among the States, and sedition among the people, and the president sent a message to Congress advising efficient measures to prevent the circulation of such incendiary petition. A select committee reported to Congress, as follows, on the subject:

“The message, as has been stated, recommends that Congress should pass a law to punish the transmission, through the mail, of incendiary publications intended to instigate the slaves to insurrec-

tion. It of course assumes for Congress a right to determine what papers are incendiary and intended to excite insurrection. The question, then is,—has Congress such a right? A question of vital importance to the slave-holding States, as will appear in the course of the discussion.

“After examining this question with due deliberation, in all its bearings, the committee are of opinion, not only that Congress has not the right, but that to admit it would be fatal to the States.” 5 *Calhoun's Works*, p. 196.

He who regards slavery in those States simply under the relation of master and slaves, as important as that relation is,—viewed merely as a question of property to the slave-holding section of the Union,—has a very imperfect conception of the institution, and the impossibility of abolishing it without disasters unexampled in the history of the world. To understand its nature and importance fully, it must be borne in mind that slavery, as it exists in the Southern States (including under the Southern all the slave-holding States), involves not only the relation of master and slave, but also the social and political relations of two races, of nearly equal numbers, from different quarters of the globe, and the most opposite of all others in every particular that distinguishes one race of men from another. Emancipation would destroy these relations—would divest the masters of their property, and subvert the relation, social and political, that has existed between the races from almost the first settlement of the Southern States. 5 *Calhoun's Works*, p. 203.

It is against this relation between the two races that the blind and criminal zeal of the Abolitionists is directed—a relation that now preserves in quiet and security more than 6,500,000 human beings, and which can not be destroyed without destroying the peace and prosperity of nearly half the States of the Union, and involving their entire population in a deadly conflict, that must terminate either in the expulsion or extirpation of those who are the object of the misguided and false humanity of those who claim to be their friends.

He must be blind, indeed, who does not perceive that the subversion of a relation which must be followed with such disastrous consequences, can only be effected by convulsions that would devastate the country, burst asunder the bonds of the Union, and engulf, in a sea of blood, the institutions of the country. It is madness to suppose that the slave-holding States would quietly submit to be sacrificed. Every consideration—interest, duty, and humanity—the love of country—the sense of wrong, hatred of oppressors, and treacherous and faithless confederates—and, finally, despair—would impel them to the most daring and desperate resistance in defence of property, family, country, liberty, and existence.

But wicked and cruel as is the end aimed at, it is fully equalled by the criminality of the means by which it is proposed to be accomplished. These, as has been stated, consist in organized societies and a powerful press, directed mainly with a view to excite the bitterest animosity and hatred of the people of the non-slave-holding States against the citizens and institutions of the slave-holding States. It is easy to see to what disastrous results such means must tend. Passing

over the more obvious effects, their tendency to excite to insurrection and servile war, with all its horrors, and the necessity which such tendency must impose on the slave-holding State to resort to the most rigid discipline and severe police, to the great injury of the present condition of the slaves, there remains another, threatening incalculable mischief to the country. *5 Calhoun's Works, pp. 205-6.*

In 1844, Great Britain undertook to abolish slavery in Texas, and to prevent her admission into the Union, except on condition that she enter as a non-slave State. In consequence of this a rather warm controversy arose between the United States and Great Britain, conducted on the one side by Mr. Calhoun, as Secretary of State, and Mr. Packingham, Envoy Extraordinary, and Minister Plenipotentiary of Her Britannic Majesty. See *5 Calhoun's Works, p. 333.*

In one of these letters, Mr. Calhoun says:

"So long as Great Britain confined her policy to the abolition of slavery in her own possessions and colonies, no other country had a right to complain. It belonged to her exclusively to determine, according to her own views of policy, whether it should be done or not. But when she goes beyond, and avows it as her settled policy, and the object of her constant exertions, to abolish it throughout the world, she makes it the duty of all other countries, whose safety or prosperity may be endangered by her policy, to adopt such measures as they may deem necessary for their protection.

"It is with still deeper concern the President regards the avowal of Lord Aberdeen of the desire of Great Britain to see slavery abolished in Texas<sup>1</sup>, and, as he infers, is endeavoring, through her diplomacy, to accomplish it, by making the abolition of slavery one of the condition on which Mexico should acknowledge her independence. *5 Calhoun's Works, pp. 333-334.*

In 1821, Mr. Madison wrote to Gen. LaFayette as follows on the subject:

The negro slavery, is, as you justly complain, a sad blot on our free country, though a very ungracious subject of reproaches from the quarter which has been most lavish of them.<sup>2</sup> No satisfactory plan

<sup>1</sup>Some other American statesmen have thought as did Mr. Calhoun, that this interference of England with the institution of slavery was not wholly philanthropic, that she thought she could drive this issue as a wedge between the Northern and Southern States, and thus weaken one of her most formidable competitors for supremacy of wealth and commerce with other American governments.

<sup>2</sup>There is no doubt that slavery was morally wrong and contrary to the laws of nature and teachings of philanthropy. Yet there was another phase of the question in the Southern States which the world, and especially the abolitionists and the partisan poli-

iticians of the Northern States wholly ignored—that of social equality for the negroes with the whites. This was morally wrong, and contrary to the laws of nature. Here was a social and political status, that the abolition of slavery would produce that abolitionists ignored. The South was no more responsible for slavery in the United States than was the North and East. To have freed all slaves without changing the Constitution so as to make them citizens, would have wrecked and ruined the Southern States, and all the people thereof, white and black. There was involved not only property rights, but the political, social and moral relations of the two races required a change in the Constitution.



has yet been devised for taking out the stain. If an asylum could be found in Africa, that would be the appropriate destination for the unhappy race among us. Some are sanguine that the efforts of an existing Colonization Society will accomplish such a provision; but a very partial success seems the most that can be expected. Some other region must, therefore, be found for them as they become free and willing to emigrate. The repugnance of the whites to their continuance among them is founded on prejudices, themselves founded on physical distinctions, which are not likely soon, if ever, to be eradicated. Even in States, Massachusetts for example, which displayed most sympathy with the people of colour on the Missouri question, prohibitions are taking place against their becoming residents. They are everywhere regarded as a nuisance, and must really be such as long as they are under the degradation which public sentiment inflicts on them. They are at the same time rapidly increasing from manumissions and from offsprings, and of course lessening the general disproportion between the slaves and the whites. This tendency is favorable to the cause of a universal emancipation. *Writings of Madison*, pp. 239-240.

### Causes of the War Between the States

Mr. Davis, the President of the Confederate States, and therefore the Commander-in-Chief of the Confederate Army in the war between the States, thus states his reasons as to the cause of the war between the States. He contended that slavery was an incident, but not the cause of war:

Ignorance and credulity have enabled unscrupulous partisans so to mislead public opinion, both at home and abroad, as to create the belief that the institution of African slavery was the chief cause, instead of being a mere incident in the group of causes, which led to the war. In keeping with the first misrepresentation was that of the position assigned to the belligerent parties. Thus, the North is represented as having fought for the emancipation of the African slaves, and the South for the increase and extension of the institution of African servitude as it existed in the Southern States. Therein is a twofold fallacy. First, the dominant party at the North, in 1861, through their exponent, President Lincoln, declared, in his inaugural message, as follows:

"I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so; and I have no inclination to do so."

This declaration was reinforced by quoting from the platform of the political convention which nominated him, an emphatic resolution, in these words:

"Resolved, That the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depends; and we denounce the lawless invasion, by armed force, of the soil of any State or Territory, no matter under what pretext, as among the gravest of crimes."

When Mr. Lincoln endorsed that resolution and incorporated it in his inaugural the effect was like a rift in the cloud while the storm and darkness were gathering, and the words closely following were the more cheering because of the prevalent belief in his rugged honesty. Pity that the confidence should have been impaired by subsequent passages in his address, and that the past and passing acts and avowals of his party gave no reasonable expectation that he would be able to execute his declared policy.

Federation had so generally proved a failure that the world had become distrustful of it; but its success in the United States had revived the hopes of those who saw in it the best mode of securing community welfare and happiness. It was therefore most proper to denounce *as among the gravest of crimes* the armed invasion of any State; for their conquest would be the extinguishment of the beacon which was illuminating the world by the rays of federal liberty.

If additional evidence be needed to prove that "emancipation" was not an original purpose, it may be found not only in the inaugural, but also in the fact that President Lincoln subsequently defended the issuance of his emancipation proclamation, in 1863, on the ground of "military necessity."

The existence of African servitude gave rise to acrimonious political discussions long before the secession of the Southern States in 1861; and owing to the persistent misrepresentations and a general misunderstanding of the true nature and character of the questions growing out of the institution, the misconceptions that have been engendered not in our own country only, but, still more, abroad, have tended and still tend to mislead the judgment of the world in arriving at a correct apprehension of the causes of the war between the States and of the controversies that preceded it. *Davis on the History of the Confederate States, p. 13.*

### Madison's Views of Emancipation

A general emancipation of slaves ought to be: 1. Gradual. 2. Equitable, and satisfactory to the individuals immediately concerned. 3. Consistent with the existing and durable prejudice of the nation.

That it ought, like remedies for other deep-rooted and widespread evils, to be gradual, is so obvious, that there seems to be no difference of opinion on that point.

To be equitable and satisfactory, the consent of both the master and the slave should be obtained. That of the master will require a provision in the plan for compensating a loss of what he held as property, guaranteed by the laws, and recognized by the Constitution. That of the slave, requires that his condition in a state of freedom be preferable, in his estimation, to his actual one in a state of bondage. *3 Writings of Madison, pp. 133-134.*

Supposing the number of slaves to be 1,500,000, and their price to average 400 dollars, the cost of the whole would be 600 millions of dollars. These estimates are probably beyond the fact; and from the number of slaves should be deducted: 1. Those whom their masters would not part with. 2. Those who may be gratuitously set free by their masters. 3. Those acquiring freedom under emancipating regulations of the States. 4. Those preferring slavery where they are to

freedom in an African settlement. On the other hand, it is to be noted that the expense of removal and settlement is not included in the estimated sum; and that an increase of the slaves will be going on during the period required for the execution of the plan.

On the whole, the aggregate sum needed may be stated at about six hundred millions of dollars.<sup>1</sup> *3 Writings of Madison, p. 136.*

### States' Rights as to Slavery

The following is from a report of Mr. Webster's speech in Richmond, Virginia, in 1840:

I hold that Congress is absolutely precluded from interfering in any manner, direct or indirect, with this, as with any other of the institutions of the State. [The cheering was here loud and long continued, and a voice from the crowd exclaimed, "We wish this could be heard from Maryland to Louisiana, and we desire that the sentiment just expressed may be repeated. Repeat! Repeat!"] Well, I repeat it; proclaim it on the wings of all the winds, tell it to all your friends,—[cries of "We will! We will!"]—tell it, I say, that, standing here in the Capitol of Virginia, beneath an October sun, in the midst of this assemblage, before the entire country, and upon all the responsibility which belongs to me, I say that there is no power, direct or indirect, in Congress or the general government, to interfere in the slightest degree with the institutions of the South.

And now, fellow-citizens, I ask you only to do me one favor. I ask you to carry that paper home; read it; read it to your neighbors; and when you hear the cry, "Shall Mr. Webster, the Abolitionist, be allowed to profane the soil of Virginia?" then you will tell them that, in connection with the doctrine in that speech, I hold that there are two governments over us, each possessing its own distinct authority, with which the other may not interfere. I may differ from you in some things, but I will here say that, as to the doctrines of State rights, as held by Mr. Madison in his last days, I do not know that we differ at all. *2 Webster's Works, (7th ed.), p. 94.*

In 1851, Mr. Webster, in a speech to the young men of Albany, New York, said:

Some fifteen years ago, when some of the States, the free States, thought it proper to pass laws prohibiting their own magistrates and officers from executing this law of Congress, under heavy penalties, and refusing to the United States authorities the use of their prisons for the detention of persons arrested as fugitive slaves, that is to say, these States passed acts defeating the law of Congress, as far as it was in their power to defeat it, those of them to which I refer not all, but several, nullified the law of 1793 entirely. They said, in effect, "We will not execute it. No runaway slave shall be restored."

<sup>1</sup>These facts and figures were given in 1820.

Mr. Jefferson and Washington had hoped that abolition of slavery would eventually come through peaceable emancipation. Jefferson and Madison believed and so stated each to the

other and publicly, that but for the Missouri Compromise, that made the question a sectional one, that emancipation would eventually have come peaceably. It was not to them a compromise; but "the ringing of fire-bells at night."

Thus the law became a dead letter, an entire dead letter. But here was the constitutional compact, nevertheless, still binding; here was the stipulation, as solemn as words could form it, and which every member of Congress, every officer of the general government, every officer of the State governments, from governors down to constables, is sworn to support. 2 *Webster's Works*, (7th ed.), p. 575.

In speaking of the fugitive slave law of 1850, Mr. Webster said:

All judicial opinions are in favor of this law. You cannot find a man in the profession in New York, whose income reaches thirty pounds a year, who will stake his professional reputation on an opinion against it. If he does, his reputation is not worth the thirty pounds. And yet this law is opposed, violently opposed, not by bringing this question into court; these lovers of human liberty, these friends of the slave, the fugitive slave, do not put their hands in their pockets, and draw funds to conduct lawsuits, and try the question; they are not much in that habit. That is not the way they show their devotion to liberty of any kind. But they meet and pass resolutions; they resolve that the law is oppressive, unjust, and should not be executed at any rate, or under any circumstances. 2 *Webster's Works*, (7th ed.), p. 577.

In a speech at Buffalo, New York, in 1851, Mr. Webster thus declares the meaning of this provision of the Constitution:

There is no man who can read these words of the Constitution of the United States, and say they are not clear and imperative. "No person," the Constitution says, "held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be done." Why, you may be told by forty conventions in Massachusetts, in Ohio, in New York, or elsewhere, that, if a colored man comes here, he comes as a freeman; that is a *non sequitur*. It is not so. If he comes as a fugitive from labor, the Constitution says he is not a freeman, and that he shall be delivered up to those who are entitled to his service. 2 *Webster's Works*, (7th ed.), p. 55.

Under the provisions of the Constitution, during Washington's administration, in the year 1793, there was passed, by general consent, a law for the restoration of fugitive slaves. Hardly any one opposed it at that period; it was thought to be necessary, in order to carry the Constitution into effect; the great men of New England and New York all concurred in it. It passed, and answered all the purposes expected from it, till about the year 1841 or 1842, when the States interfered to make enactments in opposition to it. The act of Congress said that State magistrates might execute the duties of the law. Some of the States passed enactments imposing a penalty on any State officers who exercised authority under the law, or assisted in its execution; others deny the use of their jails to carry the law into effect, and, in general, at the commencement of the year 1850, it had



become absolutely indispensable that Congress should pass some law for the execution of this provision of the Constitution, or else give up that provision entirely. *2 Webster's Works, (7th ed.), p. 558.*

Such is the present law; and, much opposed and maligned as it is, it is more favorable to the fugitive slave than the law enacted during Washington's administration, in 1793, which was sanctioned by the North as well as by the South. The present violent opposition has sprung up in modern times. From whom does this clamor come? Why, look at the proceedings of the anti-slavery conventions; look at their resolutions. Do you find among those persons who oppose this Fugitive Slave Law any admission whatever, that any law ought to be passed to carry into effect the solemn stipulations of the Constitution? Tell me any such case; tell me if any resolution was adopted by the convention at Syracuse favorable to the carrying out of the Constitution? Not one! The fact is, Gentlemen, they oppose the constitutional provision; they oppose the whole! Not a man of them admits that there ought to be any law on the subject. They deny, altogether, that the provisions of the Constitution ought to be carried into effect. Look at the proceedings of the anti-slavery convention in Ohio, Massachusetts, and at Syracuse, in the State of New York. What do they say? "That, so help them God, no colored man shall be sent from the State of New York back to his master in Virginia." *2 Webster's Works, (7th ed.), p. 559.*

Gentlemen, I expect to be libelled and abused. Yes, libelled and abused. But it does not disturb me. I have not lost a night's rest for a great many years from any cause. I have some talent for sleeping. And why should I not expect to be libelled? Is not the Constitution of the United States libelled and abused? Do not some people call it a covenant with hell? Is not Washington libelled and abused? Is he not called a bloodhound on the track of the African negro? Are not our fathers libelled and abused by their own children? And ungrateful children they are. How, then, shall I escape? I do not expect to escape; but, knowing these things, I impute no bad motive to any men of character and fair standing. The great settlement measures of the last Congress are laws. *2 Webster's Works, (7th ed.), p. 561.*

In the 30s and 40s Mr. Calhoun in the Senate said:

We have arrived at a new and important point in reference to the abolition question. It is no longer in the hands of quiet and peaceful, but I cannot add, harmless Quakers. It is now under the control of ferocious zealots, blinded by fanaticism, and, in pursuit of their object, regardless of the obligations of religion or morality. They are organized throughout every section of the non-slave-holding States; they have the disposition of almost unlimited funds, and are in possession of a powerful press, which, for the first time, is enlisted in the cause of abolition, and turned against the domestic institutions, and the peace and security of the South. To guard against the danger in this new and more menacing form, the slave-holding States will be compelled to revise their laws against the introduction and circula-

tion of publications calculated to disturb their peace and endanger their security, and to render them far more full and efficient than they have heretofore been. 2 *Calhoun's Works*, pp. 530-531.

### How Slavery Led to Secession

In the Senate of the United States in 1847, Mr. Calhoun said:

Mr. President, it was solemnly asserted on this floor some time ago, that all parties in the non-slave-holding States had come to a fixed and solemn determination upon two propositions. One was, that there should be no further admission of any States into this Union which permitted, by their constitutions, the existence of slavery; and the other was,—that slavery shall not hereafter exist in any of the territories of the United States; the effect of which would be to give to the non-slave-holding States the monopoly of the public domain, to the entire exclusion of the slave-holding States. Since that declaration was made, we have had abundant proof that there was a satisfactory foundation for it. We have received already solemn resolutions passed by seven of the non-slave-holding States—one-half of the number already in the Union, Iowa not being counted—using the strongest possible language to that effect; and no doubt, in a short space of time, similar resolutions will be received from all of the non-slaveholding States. But we need not go beyond the walls of Congress. The subject has been agitated in the other House, and they have sent up a bill “prohibiting the extension of slavery” (using their own language) “to any territory which may be acquired by the United States hereafter.” 4 *Calhoun's Works*, p. 340.

We, Mr. President, have at present only one position in the Government, by which we may make any resistance to this aggressive policy, which has been declared against the South; or any other that the non-slave-holding States may choose to adopt. And this equality in this body is one of the most transient character. Already Iowa is a State; but owing to some domestic difficulties, is not yet represented in this body. When she appears here, there will be an addition of two Senators to the representatives here of the non-slave-holding States. Already Wisconsin has passed the initiatory state, and will be here at the next session. This will add two more, making a clear majority of four in this body on the side of the non-slave-holding States, who will thus be enabled to sway every branch of this Government at their will and pleasure. But, if this aggressive policy be followed—if the determination of the non-slave-holding States is to be adhered to hereafter, and we are to be entirely excluded from the territories which we already possess, or may possess—if this is to be the fixed policy of the Government, I ask what will be our situation hereafter? 4 *Calhoun's Works*, pp. 341-2.

Sir, can we find any hope by looking to the past? If we are to look to that—I will not go into the details—we will see, from the beginning of this Government to the present day, as far as pecuniary resources are concerned—as far as the disbursement of revenue is involved, it will be found that we have been a portion of the com-

munity which has substantially supported this Government without receiving anything like a proportionate return. *4 Calhoun's Works, p. 343.*

Now, I ask, is there any remedy? Does the Constitution afford any remedy? And if not, is there any hope? These, Mr. President, are solemn questions—not only to us, but, let me say to gentlemen from the non-slave-holding States, to them. Sir, the day that the balance between the two sections of the country—the slave-holding States and the non-slave-holding States—is destroyed, is a day that will not be far removed from political revolution, anarchy, civil war, and wide-spread disaster. The balance of this system is in the slave-holding States. They are the conservative portion—always have been the conservative portion—always will be the conservative portion; and with a due balance on their part may, for generations to come, uphold this glorious Union of ours. But if this scheme should be carried out—if we are to be reduced to a handful—if we are to become a mere ball to play the presidential game with—to count something in the Baltimore caucus—if this is to be the result—wo! wo! I say, to this Union. *4 Calhoun's Works, pp. 343-4.*

I see my way in the constitution; I cannot in a compromise. A compromise is but an act of Congress. It may be overruled at any time. It gives us no security. But the constitution is stable. It is a rock. On it we can stand, and on it we can meet our friends from the non-slave-holding States. It is a firm and stable ground, on which we can better stand in opposition to fanaticism, than on the shifting sands of compromise.

Let us be done with compromise. Let us go back and stand upon the constitution. *4 Calhoun's Works, p. 347.*

I am a planter—a cotton-planter. I am a Southern man and a slaveholder—a kind and a merciful one, I trust—and none the worse for being a slaveholder. I say, for one, I would rather meet any extremity upon earth than give up one inch of our equality—one inch of what belongs to us as members of this great republic! What! acknowledge inferiority! The surrender of life is nothing to sink down into acknowledged inferiority!

I have examined this subject largely—widely. I think I see the future. If we do not stand up as we ought, in my humble opinion, the condition of Ireland is prosperous and happy—the condition of Hindustan is prosperous and happy—the condition of Jamaica is prosperous and happy, compared with what must be that of the Southern States. *4 Calhoun's Works, p. 348.*

### John Brown's Raid

The raid into Virginia under John Brown—then notorious as a fanatical partisan leader in the Kansas troubles—occurred in October, 1859, a few weeks before the meeting of the Thirty-sixth Congress. Insignificant in itself and in its immediate results, it af-

forded a startling revelation of the extent to which sectional hatred and political fanaticism had blinded the conscience of a class of persons in certain States of the Union; forming a party steadily growing stronger in numbers, as well as in activity. Sympathy with its purposes or methods was earnestly disclaimed by the representatives of all parties in Congress; but it was charged, on the other hand, that it was only the natural outgrowth of doctrines and sentiments which for some years had been freely avowed on the floors of both Houses. A committee of the Senate made a long and laborious investigation of facts, with no very important or satisfactory results. In their final report, June 15, 1860, accompanying the evidence obtained and submitted, this Committee said:

It (the insurrection) was simply the act of lawless ruffians, under the sanction of no public or political authority, distinguishable only from ordinary felonies by the ulterior ends in contemplation by them, and by the fact that the money to maintain the expedition, and the large armament they brought with them, has been contributed and furnished by the citizens of other States of the Union under circumstances that must continue to jeopardize the safety and peace of the Southern States, and against which Congress has no power to legislate. *Davis on The Rise and Fall of the Confederate Government, 41.*

On February 2, 1860, Mr. Davis, then a Senator from the State of Mississippi, introduced in the Senate seven resolutions, which were adopted on May 24 and 25 of that year. The first and last of these resolutions were as follows:

"1. *Resolved*, That, in the adoption of the Federal Constitution, the States, adopting the same, acted severally as free and independent sovereigns, delegating a portion of their powers to be exercised by the Federal Government for the increased security of each against dangers, *domestic* as well as foreign; and that any intermeddling by any one or more States, or by a combination of their citizens, with the domestic institutions of the others, on any pretext whatever, political, moral, or religious, with the view to their disturbance or subversion, is in violation of the Constitution, insulting to the States so interfered with, endangers their domestic peace, and tranquillity—objects for which the Constitution was formed—and, by necessary consequence, tends to weaken and destroy the Union itself."

"7. *Resolved*, That the provision of the Constitution for the rendition of fugitives from service or labor, 'without the adoption of which the Union could not have been formed,' and that the laws of 1793 and 1850, which were enacted to secure its execution, and the main features of which, being similar, bear the impress of nearly seventy years of sanction by the highest judicial authority, should be honestly and faithfully observed and maintained by all who enjoy the benefits of our compact of union; and that all acts of individuals or of State Legislatures to defeat the purpose or nullify the requirements of that provision, and the laws made in pursuance of it, are hostile in character, subversive of the Constitution, and revolutionary in their effect."



### The Missouri Compromise

The following is from Story on the Constitution:

In the year 1819, however, there sprung up suddenly and unexpectedly a violent and acrimonious conflict, which for a time threatened the peace of the country, and shook the confidence of many strong minds in the perpetuity of the Union. The occasion for this controversy was the proposal to admit to the Union the new State of Missouri, formed from the territory acquired from France in 1803, under the name of Louisiana.

"Like a fire-bell in the night," was the striking comparison of Mr. Jefferson. Letter to Holmes, Jefferson's Works, VII, 159. It will be seen from the correspondence between Mr. John Adams and Mr. Jefferson that both of them had gloomy forebodings of sectional difficulties and possible disunion from this controversy. Indeed, disunion was openly threatened on the floor of Congress during the debates.

The State of Missouri made her constitution sanctioning slavery and forbidding the legislature to interfere with it. This prohibition, not usual in State constitutions, was the effect of the Missouri controversy and of foreign interference, and was adopted for the sake of peace, for the sake of internal tranquillity, and to prevent the agitation of the slave question, which could only be accomplished by excluding it wholly from the forum of elections and legislation. Benton's Thirty Years' View, I. 8. *Story on the Constitution, Vol. V, p. 664, (note.)*

In 1840, and again in 1844, a distinctive anti-slavery party had its presidential candidates in the field, and the votes drawn away from the other candidates in the election last mentioned affected sensibly, and as many thought conclusively, the general result.

The compromises of the Constitution were oftentimes disregarded and contemned, church organizations were broken asunder, and patriotic statesmen, who looked upon the strengthening and perpetuation of the Union as the chief hope and only sure guaranty of our liberties, began to anticipate the future with mingled feelings of doubt, distrust, and alarm.

Mr. Lincoln's remarks, in a speech at Springfield, Ill., June 17, 1858, were equally pointed: "A house divided against itself cannot stand! I believe this government cannot endure permanently half slave and half free. I do not expect the union to be dissolved; I do not expect the house to fall; but I do expect it will cease to be divided. It will become all one thing or all the other. Either the opponents of slavery will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction, or its advocates will push it forward till it shall become alike lawful in all the States, old as well as new, North as well as South." Similar views were frequently expressed by Southern statesmen. See Mr. H. S. Foote's statement of the fact in his War of the Rebellion, p. 18. *Story on the Constitution, Vol. V, p. 667, (note.)*

In 1860, the candidate of the anti-slavery party for President was chosen by a considerable plurality, and this success being regarded on the part of leaders of public opinion, in the Southern States, as evi-

dence of a fixed determination in the opposite section of the Union to intermeddle with Southern institutions in an unconstitutional manner, they refused to accept any explanation or any assurance to the contrary, but took immediate steps for the disruption of the Union. Claiming a right in the several States to withdraw at will from the confederacy they had formed, they proceeded in the assertion of that right, and declared their unalterable determination, in case it should be contested, to submit it to the arbitrament of force. Thus slavery became the immediate occasion of the civil war, though the assumed right of secession had no necessary connection with slavery, and might have been asserted on any other ground or occasion with the same plausibility. *Story's Const.*, Vol. V, p. 668, note.

Mr. Calhoun says of this measure :

In the session of 1819-1820, a question arose that exposed the patent danger. The admission of the territory of Missouri, as a State of the Union, was resisted on the ground that its constitution did not prohibit slavery. The contest, after a long and angry discussion, was finally adjusted by a compromise, which admitted her as a slave-holding State, on condition that slavery should be prohibited in all the territories belonging then to the United States, lying north of 36° 30'. This compromise was acquiesced in by the people of the South; and the danger, apparently, and, as every one supposed, permanently removed. Experience, however, has proved how erroneous were their calculations. The disease lay deep. It touched a fanatical as well as a political chord. There were not a few in the northern portion of the Union, who believed that slavery was a sin, as well as a great political evil; and who remained quiet in reference to it, only because they believed that it was beyond their control;—and that they were in no way responsible for it. So long as the government was regarded as a federal government with limited powers, this belief of the sinfulness of slavery remained in a dormant state,—as it still does in reference to the institution in foreign countries; but when it was openly proclaimed, as it was by the passage of the act of 1833, that the government had the right to judge, in the last resort of the extent of its powers; and to use the military and naval forces of the Union to carry its decision into execution; and when its passage by the joint votes of both parties furnished a practical assertion of the right claimed in an outrageous case, the chord was touched which roused it into action. The effects were soon made visible. In two years thereafter, in 1835, a systematic movement was, for the first time, commenced to agitate the question of abolition, by **flooding the Southern States** with documents calculated to produce discontent among the slaves;—and Congress, with petitions to abolish slavery in the District of Columbia. *1 Calhoun's Works*, pp. 372-373.

The effect of this was, to induce both parties to seek the votes of every faction or combination by whose aid they might hope to succeed;—flattering them in return, with the prospect of establishing the doctrines they professed, or of accomplishing the objects they desired. This state of things could not fail to give importance to any fanatical party, however small, which cared more for the object that united them, than for the success of either party; especially if

it should be of a character to accord, in the abstract, with the feeling of that portion of the community generally. Each of the great parties, in order to secure their support, would, in turn, endeavor to conciliate them, by professing a great respect for them, and a disposition to aid in accomplishing the objects they wished to effect. *1 Calhoun's Works, p. 374.*

This question was thus spoken of, and its results dreaded by Jefferson and Adams, among their last letters each to the other, the question was thus discussed.

Jefferson to Adams:

The banks, bankrupt law, manufactures, Spanish treaty, are nothing. They are occurrences which, like waves in a storm, will pass under the ship. But the Missouri question is a breaker on which we lose the Missouri country by revolt, and what more, God only knows. From the battle of Bunker's Hill to the treaty of Paris, we never had so ominous a question. It even damps the joy with which I hear of your high health, and welcomes to me the consequences of my want of it. I thank God that I shall not live to witness its issue. *15 Jefferson's Writings, (Mem. ed.), pp. 232-3.*

Adams to Jefferson:

The Missouri question, I hope, will follow the other waves under the ship, and do no harm. I know it is high treason to express a doubt of the perpetual duration of our vast American empire, and our free institutions; and I say as devoutly as father Paul, *estor perpetua*, but I am sometimes Cassandra enough to dream that another Hamilton, and another Burr, might rend this mighty fabric in twain, or perhaps into a leash; and a few more choice spirits of the same stamp, might produce as many nations in North America as there are in Europe. *15 Jefferson's Writings, (Mem. ed.), pp. 236-7.*

In a letter to Hugh Nelson a few months later, Jefferson said:

I thank you, dear sir, for the information in your favor of the 4th instant, of the settlement for the present, of the Missouri question. I am so completely withdrawn from all attention to public matters, that nothing less could arouse me than the definition of a geographical line, which on an abstract principle is to become the line of separation of these States, and to render desperate the hope that man can ever enjoy the two blessings of peace and self-government. The question sleeps for the present, but is not dead. *15 Jefferson's Writings, (Mem. ed.), p. 238.*

A month later he wrote to Mark Langdon Hill:

I congratulate you on the sleep of the Missouri question. I wish I could say on its death, but of this I despair. The idea of a geographical line once suggested will brood in the minds of all those who prefer the gratification of their ungovernable passions to the peace and union of their country. *15 Jefferson's Writings, (Mem. ed.), p. 243.*

A little later he wrote to William Short:

The old schism of federal and republic threatened nothing, because it existed in every State, and united them together by the fraternism of party. But the coincidence of a marked principle, moral and political, with a geographical line, once conceived, I feared would never more be obliterated from the mind; that it would be recurring on every occasion and renewing irritations, until it would kindle such mutual and mortal hatred, as to render separation preferable to eternal discord. I have been among the most sanguine in believing that our Union would be of long duration. I now doubt it much, and see the event at no great distance, and the direct consequence of this question. *15 Jefferson's Writings, (Mem. ed.), p. 247.*

A little later he wrote to John Holmes:

I had for a long time ceased to read newspapers, or pay any attention to public affairs, confident they were in good hands, and content to be a passenger in our bark to the shore from which I am not distant. But this momentous question, like a fire-bell in the night, awakened and filled me with terror. I considered it at once as the knell of the Union. It is hushed, indeed, for the moment. But this is a reprieve only, not a final sentence. A geographical line, coinciding with a marked principle, moral and political, once conceived and held up to the angry passions of men, will never be obliterated; and every new irritation will mark it deeper and deeper. I can say, with conscious truth, that there is not a man on earth who would sacrifice more than I would to relieve us from this heavy reproach, in any *practicable* way. The cession of that kind of property, for so it is misnamed, is a bagatelle which would not cost me a second thought, if, in that way, a general emancipation and *expatriation* could be effected; and, gradually, and with due sacrifices, I think it might be. But as it is, we have the wolf by the ears, and we can neither hold him, nor safely let him go. Justice is in one scale, and self-preservation in the other. *15 Jefferson's Writings, (Mem. ed.), p. 249.*

I regret that I am now to die in the belief, that the useless sacrifice of themselves by the generation of 1776, to acquire self-government and happiness to their country, is to be thrown away by the unwise and unworthy passions of their sons, and that my only consolation is to be, that I live not to weep over it. If they would but dispassionately weigh the blessings they will throw away, against an abstract principle more likely to be effected by union than by scission, they would pause before they would perpetrate this act of suicide on themselves, and of treason against the hopes of the world. To yourself, as the faithful advocate of the Union, I tender the offering of my high esteem and respect. *15 Jefferson's Writings, (Mem. ed.), p. 250.*

In 1820 he wrote to Mr. Pinckney:

The Missouri question is a mere party trick. The leaders of federalism, defeated in their schemes of obtaining power by rallying partisans to the principle of monarchism, a principle of personal, not of local division, have changed their tack, and thrown out another



barrel to the whale. They are taking advantage of the virtuous feelings of the people to effect a division of parties by a geographical line; they expect that this will ensure them, on local principles, the majority they could never obtain on principles of federalism; but they are still putting their shoulder to the wrong wheel; they are wasting Jeremiads on the miseries of slavery, as if we were advocates for it. *15 Jefferson's Writings, (Mem. ed.), p. 280.*

In 1820, Mr. Jefferson, in writing to LaFayette, spoke of the question in the United States as follows:

The boisterous sea of liberty indeed is never without a wave, and that from Missouri is now rolling towards us, but we shall ride over it as we have all others. It is not a moral question, but one merely of power. Its object is to raise a geographical principle for the choice of a President, and the noise will be kept up till that is effected. All know that permitting the slave of the South to spread into the West will not add one being to that unfortunate condition, that it will increase the happiness of those existing, and by spreading them over a larger surface, will dilute the evil everywhere, and facilitate the means of getting finally rid of it, an event more anxiously wished by those on whom it presses than by the noisy pretenders to exclusive humanity. In the meantime, it is a ladder for rivals climbing to power. *15 Jefferson's Writings, (Mem. ed.), pp. 300-301.*

Mr. Jefferson was certainly prophetic as to the objects and consequences of the Missouri Compromise. His philosophy was that if the people were left free they would eventually settle the questions peaceably; but if it was by written law made a sectional and geographical question, this would increase and aggravate the sectional issue already intense on account of the tariff question, and that as most all the slaves were in the Southern States, it would therefore lead to a settlement by force, and a separation of the States into two groups.

In 1821, Mr. Jefferson wrote Mr. Adams on the subject as follows:

Our anxieties in this quarter are all concentrated in the question, what does the Holy Alliance in and out of Congress mean to do with us on the Missouri question? And this, by-the-by, is but the name of the case, it is only the John Doe or Richard Roe of the ejection. The real question, as seen in the States afflicted with this unfortunate population, is, are our slaves to be presented with freedom and a dagger? For if Congress has the power to regulate the conditions of the inhabitants of the States, within the States, it will be but another exercise of that power, to declare that all shall be free. Are we then to see again Athenian and Lacedæmonian confederacies? To wage another Peloponnesian war to settle the ascendancy between them? Or is this the tocsin of merely a servile war? That remains to be seen;

but not, I hope, by you or me. Surely, they will parley awhile, and give us time to get out of the way. What a Bedlamite is man! 15 *Jefferson's Writings, (Mem. ed.), pp. 308-9.*

### Slavery

In 1826, just before his death, Mr. Jefferson wrote to Edward Everett, who had submitted to him a proposed amendment to the Constitution, relative to slavery, as follows:

On the question of the lawfulness of slavery, that is of the right of one man to appropriate to himself the faculties of another without his consent, I certainly retain my early opinions. On that, however, of third persons to interfere between the parties, and the effect of conventional modifications of that pretension, we are probably nearer together. I think with you, also, that the Constitution of the United States is a compact of independent nations subject to the rules acknowledged in similar cases, as well as that of amendment provided within itself, as, in case of abuse, the justly dreaded but unfavorable *ultimo ratio gentium*. The report on the Panama question in your letter has, as I suppose, got separated by the way. It will probably come by another mail. In some of the letters you have been kind enough to write me, I have been made to hope the favor of a visit from Washington. It would be received with sincere welcome, and unwillingly relinquished if no circumstance should render it inconvenient to yourself. I repeat always with pleasure the assurances of my great esteem and respect. 16 *Jefferson's Writings, (Mem. ed.), pp. 162-3.*

### Compromise Measures of 1850

The following is from Mr. Davis' books:

The first session of the Thirty-first Congress (1849-'50) was a memorable one. The recent acquisition from Mexico of New Mexico and California required legislation by Congress. In the Senate the bills reported by the Committee on Territories were referred to a select committee, of which Mr. Clay, the distinguished Senator from Kentucky, was chairman. From this committee emanated the bills which, taken together, are known as the compromise measures of 1850. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 14.*

Mr. Davis relates this incident relative to these acts:

While the compromise measures of 1850 were pending, and the excitement concerning them was at its highest, I one day overtook Mr. Clay, of Kentucky, and Mr. Berrien, of Georgia, in the Capitol grounds. They were in earnest conversation. It was the 7th of March—the day on which Mr. Webster had delivered his great speech. Mr. Clay, addressing me in a friendly manner which he had always employed since I was a school boy in Lexington, asked me what I thought of the speech. I liked it better than he did. He then suggested that I should "join the compromise men," saying that it was a measure which he thought would probably give peace to the coun-

try for thirty years—the period that had elapsed since the adoption of the compromise of 1820. Then, turning to Mr. Berrien, he said, “You and I will be under ground before that time, but our young friend here may have trouble to meet.” I somewhat impatiently declared my unwillingness to transfer to posterity a trial which they would be relatively less able to meet than we were, and passed on my way. *Davis on The Rise and Fall of the Confederate Government, Vol. I, 17, (note.)*

### **Peonage as a Form of Slavery**

The Supreme Court of the United States thus defines and discusses the subject:

Peonage may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. As was said in 1 N. Mex. 190: “One fact existed universally; all were indebted to their masters. This was the cord by which they seemed bound to their masters’ service.” Upon this is based a condition of compulsory service. Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service. We need not stop to consider any possible or exceptional cases, such as the service of a sailor, 165 U. S. 275, or the obligations of a child to its parents, or of an apprentice to his master, or the power of the legislature to make unlawful and punish criminally an abandonment by an employe of his post of labor in any extreme case. That which is contemplated by the statute is compulsory service to secure the payment of a debt. Is this legislation within the power of Congress? It may be conceded as a general proposition that the ordinary relations of individuals are subject to the control of the states and are not entrusted to the general government, but the 13th amendment, adopted as an outcome of the civil war, reads:

“Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

“Sec. 2. Congress shall have power to enforce this article by appropriate legislation.”

This amendment denounces a status or condition, irrespective of the manner or authority by which it is created. The prohibitions of

the 14th and 15th amendments are largely upon the acts of the states, but the 13th names no party or authority, but simply forbids slavery and involuntary servitude, grants to Congress power to enforce this proposition by appropriate legislation. The differences between the 13th and subsequent amendments have been fully considered. In 109 U. S. 3-23, the court said:

"This amendment, as well as the 14th, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

Section 5526 punishes "every person who holds, arrests, returns, or causes to be held, arrested, or returned." Three distinct acts are here mentioned—holding, arresting, returning. The disjunctive "or" indicates the separation between them, and shows that either one may be the subject of indictment and punishment. A party may hold another in a state of peonage without ever having arrested him for that purpose. He may come by inheritance into the possession of an estate in which the peon is held, and he simply continues the condition which was existing before he came into possession. He may also arrest an individual for the purpose of placing him in a condition of peonage, and this whether he be the one to whom the involuntary service is to be rendered or simply employed for the purpose of making the arrest. Or he may, after one has fled from a state of peonage, return him to it, and this whether he himself claims the service or is acting simply as an agent for another to enforce the return. 187 U. S. 215-91.

State statutes providing that defendants in criminal cases could confess judgment for fine and costs with sureties and then providing that the defendant should work and labor for the surety until the amount was paid were construed by the Supreme Court of the United States.<sup>1</sup>

The Court said:

The validity of this system of State law must be judged by its operation and effect upon the rights secured by the Constitution of the United States and offenses punished by the Federal statutes. If such State statutes, upon their face, or in the manner of their administration, have the effect to deny rights secured by the Federal Constitu-

<sup>1</sup>These were Alabama statutes Secs. 7632 to 7635 of the Code of 1907, held void on appeal to the Supreme Court

of the United States, though they had many times been held valid by the Supreme Court of Alabama.



tion or to nullify statutes passed in pursuance thereto, they must fail. *Bailey v. Alabama*, 219 U. S., 219, 244; *Henderson v. Mayor*, 92 U. S., 259, 268.

Nor do we think this case is controlled by *Freeman v. United States*, 217 U. S., 539, cited by counsel for defendants in error. In that case it was held that a money penalty imposed for embezzlement which went to the creditor, and not into the Treasury, under the Penal Code of the Philippine Islands, did not make imprisonment for the non-payment of such penalty equivalent to imprisonment for debt. In that case, although the penalty affixed went to the creditor, it was part of the sentence imposed by the law as a punishment for the crime. 235 U. S., 148, 149.

Here the State has taken the obligation of another for the fine and costs, imposed upon one convicted for the violation of the laws of the State. It has accepted the obligation of the surety, and, in the present case, it is recited in the record that the money has been in fact paid by the surety. The surety and convict have made a new contract for service, in regard to the terms of which the State has not been consulted. The convict must work it out to satisfy the surety for whom he has contracted to work. This contract must be kept, under pain of re-arrest, and another similar proceeding for its violation, and perhaps another and another. Thus, under pain, of recurring prosecutions, the convict may be kept at labor, to satisfy the demands of his employer.

In our opinion, this system is in violation of rights intended to be secured by the Thirteenth Amendment, as well as in violation of the statutes to which we have referred, which the Congress has enacted for the purpose of making that amendment effective. 235 U. S., 148, 150.

Congress passed statutes known as peonage statutes which undertook to strike down all State statutes, customs or usages, which compelled voluntary or involuntary servitude or labor, as peons in liquidation of any debt or demand other than as a punishment for crime. The States had attempted to comply with the thirteenth amendment by having the labor of the defendant to discharge the judgment of conviction. This judgment, however, was always paid or secured by the surety, for whom the defendant was required to labor and serve to repay him, for having paid the judgment. State statutes provided that the defendant should in open court enter into a written contract with the surety to so work and labor at wages stipulated in the contract, until the surety was fully repaid and if the defendant refused to perform the contract he was guilty of another offense, and could be convicted and sentenced to pay the fine and costs, as he had in the original case; and this could go on ad infinitum. The peonage acts of Congress were held to strike down these State statutes. See *Clyatt's Case*, 197 U. S., 207; *Bailey's Case*, 219 U. S., 219; *Reynolds' Case*, 235 U. S., 133.

### White Slave Traffic

The Supreme Court thus construes acts of Congress on the subject:

Section 8 of the act provides that it shall be known and referred to as the "White Slave Traffic Act," and the several provisions of the act show that its underlying purpose is the suppression of traffic in women and girls for immoral purposes so far as such traffic comes within the jurisdiction of Congress over interstate and foreign commerce. This purpose was also plainly stated by the committees of Congress in recommending the passage of the bill (H. Rept., No. 47, 61st Cong., 2d Sess.; S. Rept., No. 886, 61st Cong., 2d Sess.)

That the act is intended as a regulation of the transportation of persons as passengers appears from § 5, which provides that violations of §§ 2, 3 and 4 may be prosecuted in any district from, through or into which any such woman or girl may have been carried or transported as a passenger. *227 U. S., 313.*

The act is constitutional as a regulation of interstate and foreign commerce.

Transportation and transit of persons is commerce, persons being both the subject and the means of commercial intercourse. The statement of Mr. Justice Barbour, in *New York, v. Miln*, 11 Pet. 102, 136, that persons "are not the subject of commerce," has never received the sanction of the court, but has been expressly refuted. *Passenger Cases*, 7 How. 282, 429; *Henderson v. New York*, 92 U. S. 259; *Mobile v. Kimball*, 102 U. S. 691; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Pickard v. Pullman Car Co.*, 117 U. S. 34; *McCall v. California*, 136 U. S. 104; *Covington Bridge Co. v. Kentucky*, 154 U. S. 204. *227 U. S. 314.*

Having the power to prohibit the transportation of women and girls in interstate and foreign commerce for immoral purposes, and having exercised such power, Congress may make the prohibition effectual by punishing any person who knowingly induces, solicits, or facilitates such illegal transportation.

As to the power of Congress effectively to regulate interstate commerce by reaching unlawful acts in their very inception, see *Hipolite Egg Co. v. United States*, 220 U. S. 45.

Of course it will be said that women are not articles of merchandise, but this does not affect the analogy of the cases; the substance of the congressional power is the same, only the manner of its exercise must be accommodated to the difference in its objects. It is misleading to say that men and women have rights. Their rights cannot fortify or sanction their wrongs; and if they employ interstate transportation as a facility of their wrongs, it may be forbidden to them to the extent of the act of June 25, 1910, and we need go no farther in the present case.

The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation "among the several States;" that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215; *Cooley, Constitutional Limita-*

tions, 7th ed. 856. We have no hesitation, therefore, in pronouncing the act of June 25, 1910, The White Slave Law, a legal exercise of the power of Congress. *227 U. S., 323.*

The White Slave Traffic Act of 1910, against inducing women and girls to enter upon a life of prostitution or debauchery covers acts which might ultimately lead to that phase of debauchery which consists in sexual actions; and in this case held that there was no error in refusing to charge that the gist of the offense is the intention of the person when the transportation is procured, or that the word "debauchery" as used in the statute means sexual intercourse or that the act does not extend to any vice or immorality other than that applicable to sexual actions. *227 U. S. 326.*

On November 7, 1912, one Johnson was indicted for a violation of the White Slave Traffic Act (June 25, 1910, 36 Stat. 825 c. 395). He was arrested and the court fixed his bail at \$30,000 but declined to accept as surety any one who was indemnified against loss, or to permit the defendant to deposit cash in lieu of bond. The defendant thereupon applied for a writ of habeas corpus on the ground (1) that excessive bail was required, on terms onerous and prohibitive, and (2) that the act under which he had been indicted was unconstitutional and void. *227 U. S. 246.*

### **Abolition of Slavery**

When Mr. Lincoln was elected president and Congress was overwhelmingly Republican and filled with Abolitionists and their sympathizers, the Southern States, or a majority of their people, believed that they were to be ruthlessly deprived of their Constitutional rights and therefore resolved to secede from the Union, which they did, and which resulted in four years of war between the Northern and Southern States, the bloodiest in history up to that date. Mr. Lincoln and his party disclaimed any intention, when elected, to disregard the Constitutional rights of the Southern States as to Slavery. The Southern States, however, refused to accept these promises but believed that the party in power had determined to abolish Slavery in all the States and Territories as they did by force and arms, notwithstanding the Constitutional guarantees to the contrary. Whether Mr. Lincoln and his party would have, by force and arms, contrary to the Constitution, abolished Slavery, had the Southern States not have seceded as they did, which resulted in war, of course, cannot be known, but that it was done, contrary to the Constitution, cannot be denied. That Mr. Lincoln changed his views and policy on the subject is shown by the indisputable records.

Whether it was a necessary result of the war, and would not have happened but for the war, cannot be known and has therefore always been and always will be a debatable question.\*

The following is taken from Mr. Lincoln's first inaugural address:

Apprehension seems to exist among the people of the Southern States that by the accession of the Republican Administration their property and their peace and personal security are to be endangered. There has never been any reasonable cause for such apprehension. Indeed, the most ample evidence to the contrary has all the while existed and been open to their inspection. It is found in nearly all the published speeches of him who now addresses you. I do but quote from one of these speeches when I declare that—

"I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so."

Those who nominated and elected me did so with full knowledge that I had made this and similar declarations and had never recanted them; and more than this, they placed in the platform for my acceptance, and as a law to themselves and me, the clear and emphatic resolution which I now read:

"*Resolved*, That the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend; and we denounce the lawless invasion by armed force of the soil of any State or territory, no matter under what pretext, as among the gravest of crimes."<sup>1</sup>

I now reiterate these sentiments, and in doing so I only press upon the public attention the most conclusive evidence of which the case is susceptible that the property, peace, and security of no section are to be in anywise endangered by the now incoming Administration. I add, too, that all the protection which, consistently with the Constitution and the laws, can be given will be cheerfully given to all the States when lawfully demanded, for whatever cause—as cheerfully to one section as to another.

There is much controversy about the delivering up of fugitives from service of labor. The clause I now read is as plainly written in the Constitution as any other of its provisions:

"No person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

It is scarcely questioned that this provision was intended by those who made it for the reclaiming of what we call fugitive slaves; and the intention of the lawgiver is the law. All members of Congress swear their support to the whole Constitution—to this provision as much as to any other. To the proposition, then, that the slaves whose

\*Yet the states were invaded by armed forces.



cases came within the terms of this clause "shall be delivered up," their oaths are unanimous. Now, if they would make the effort in good temper, could they not with nearly equal unanimity frame and pass a law by means of which to keep good that unanimous oath?

There is some difference of opinion whether this clause should be enforced by national or by State authority, but surely that difference is not a very material one. If the slave is to be surrendered, it can be of but little consequence to him or to others by which authority it is done. And should anyone in any case be content that his oath shall go unkept on a merely unsubstantial controversy as to *how* it shall be kept? *Messages and Papers of the Presidents, Vol. VI, pp. 5 and 6.*

Notwithstanding the above, within eighteen months thereafter, and the Constitution unchanged, the President proclaimed the slaves in all the Southern States to be free, and the Southern States invaded by armed Federal forces. The following is taken from Mr. Lincoln's subsequent proclamation:

"Whereas on the 22d day of September, A. D. 1862, a proclamation was issued by the President of the United States, containing, among other things, the following, to wit:

"That on the 1st day of January, A. D. 1863, all persons held as slaves within any State or designated part of a State the people whereof shall then be in rebellion against the United States shall be then, henceforward, and forever free; and the executive department of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom.

"And by virtue and power and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated States and parts of States are and henceforward shall be free, and that the executive department of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons." *Messages and Papers of the Presidents, Vol. VI, pp. 157 and 158.*

If the President and Congress had no Constitutional right and power to free the slaves on the 4th of March, 1861, they certainly had no such power or right on the 26th day of September, 1862, or on the first day of January, 1863, the Constitution being unchanged. Neither secession of a part of the States in the Union and a state of war could not and did not confer any legal or Constitutional rights and powers on the President or Congress. Hence, the act of freeing the slaves was one of force and in clear violation of Constitutional rights. This is exactly what the Southern States believed the Northern States would do as soon as they acquired control of the executive and legislative departments of the Government, but

whether or not the same result would have happened had the Southern States not have seceded, no one can prove, and the question will always be debatable and debated.

The Thirteenth Amendment reads:

"Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to its jurisdiction.

"Sec. 2. Congress shall have power to enforce this article by appropriate legislation."

The Supreme Court thus construed this amendment:

The meaning of this is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the Nation. It is the denunciation of a condition and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the Nation it commits every race and every individual thereof. Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon are as much within its compass as slavery or involuntary servitude of the African. Of this Amendment it was said by Judge Miller in *Slaughter House Cases*, 16 Wall. 36, 69, "Its two short sections seem hardly to admit of construction. . . . To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this Government . . . requires an effort, to say the least of it."

Scott v. Sandford, 19 How. 393, held that slaves were not citizens. The Emancipation Proclamation made them free, and it may be admitted, made them citizens of the United States, but it did not secure to them practical freedom. That was done by the 13th Amendment, and because, under that amendment Congress may enact legislation acting primarily upon individuals, it may punish those who attempt by concerted action to deprive the Negro of his right to contract solely for the reason that he is a Negro. . . . 203 U. S. 13, 16.

Before the Thirteenth Amendment was adopted the existence of freedom or slavery within any state depended wholly upon the constitution and laws of such state. However abhorrent to many was the thought that human beings of African descent were held as slaves and chattels, no remedy for that state of things as it existed in some of the states could be given by the United States in virtue of any power it possessed prior to the adoption of the Thirteenth Amendment. The "remedy" was by force and contrary to the Constitution. Strong as it may sound the South was fighting for a constitutional right. That condition, however, underwent a radical change when that Amendment became a part of the supreme law of the land and

as such binding upon all the states and all the people, as well as upon every branch of government, Federal and state. By the Amendment it was ordained that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction;" and "Congress shall have power to enforce this article by appropriate legislation." Although in words and form prohibitive, yet, in law, by its own force, that Amendment destroyed slavery and all its incidents and badges, and established freedom. It also conferred upon every person within the jurisdiction of the United States (except those legally imprisoned for crime) the right, without discrimination against them on account of their race, to enjoy all the privileges that inhere in freedom. It went further, however, and, by its second section, invested Congress with power, by appropriate legislation, to enforce its provisions. To that end, by direct, primary legislation, Congress may not only prevent the re-establishing of the institution of slavery, pure and simple, but may make it impossible that any of its incidents or badges should exist or be enforced in any state or territory of the United States. It therefore became competent for Congress, under the Thirteenth Amendment, to make the establishing of slavery, as well as all attempts, whether in the form of a conspiracy or otherwise, to subject anyone to the badges or incidents of slavery offenses against the United States, punishable by fine or imprisonment, or both. *203 U. S. 26-7.*

At the close of the civil war, when the problem of the emancipated slaves was before the Nation, it might have left them in a condition of alienage, or established them as wards of the government like the Indian tribes, and thus retained for the Nation jurisdiction over them, or it might, as it did, give them citizenship. It chose the latter. By the Fourteenth Amendment it made citizens of all born within the limits of the United States and subject to its jurisdiction. By the Fifteenth it prohibited any state from denying the right of suffrage on account of race, color or previous condition of servitude, and by the Thirteenth it forbade slavery or involuntary servitude anywhere within the limits of the land. Whether this was or was not the wiser way to deal with the great problem is not a matter for the courts to consider. It is for us to accept the decision, which declined to constitute them wards of the Nation or leave them in a jurisdiction of alienage where they would be subject to the jurisdiction of Congress, but gave them citizenship, doubtless believing that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the states where they should make their homes. *203 U. S. 19.*

In the Civil Rights Cases, 109 U. S. 3, 22, the court passed upon the constitutionality of an act of Congress providing for the full and equal enjoyment by every race, equally, of the accommodations, advantages and facilities of theatres and public conveyances, and other places of public amusement; and in which the court also considered the scope and effect of the Thirteenth Amendment. In that case the court said: "By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected

by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the Amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States. It is true, that slavery can not exist without law, any more than property in lands and goods can exist without law; and, therefore, the Thirteenth Amendment may be regarded as nullifying all state laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed that the power vested in Congress to enforce the article by appropriate legislation clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States. . . . The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. . . . We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery; the latter prohibited the states from abridging the privileges or immunities of citizens of the U. S.—from depriving them of like liberty or property without due process of law." *203 U. S. 30.*

If the Constitution had not been amended by adding thereto the 13th, 14th and 15th amendments, the Northern States never could have enacted their will into law. Even after the surrender of the Southern army, if the Constitution had then been indorsed the Southern states would have been given every right for which they contended and the Northern states deprived of even one for which they contended.

The result of the war was not to enforce the Constitutional Government as the Constitution was then written and construed by the Supreme Court, but it was to change the Constitution and the form of Government so far as the question of slavery was concerned.

### **The Status of the Negro**

The Supreme Court of the United States has this to say on the subject:

The object of the 14th amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legisla-



tures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is 5 Cush. 198, in which the supreme judicial court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. "The great principle," said Judge Shaw, p. 206, "advanced by the learned and eloquent advocate for the plaintiff," (Mr. Chas. Sumner) "is, that by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. . . . But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and to be subject to the same treatment; but only that the rights of all, as they are settled and regulated by the law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security." It was held that the powers of the committee extended to the establishment of separate schools for children of different ages, sexes and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school, and yet have not acquired the rudiments of learning, to enable them to enter the ordinary schools. Similar laws have been enacted by congress under its general power of legislation over the District of Columbia, Rev. Stat. D. C. 281-3, 310, 319, as well as by the legislatures of many of the states, and have been generally, if not uniformly, sustained by the courts. 21 O. St. 198; 15 S. W. 765; 48 Cal. 36; 93 N. Y. 438; 83 Ky. 49.

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state. 36 Ind. 389.

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court. Thus in 100 U. S. 303, it was held that a law of West Virginia limiting to white male persons 21 years of age and citizens of the state, the right to sit upon juries, was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step toward reducing them to a condition of servility. Indeed, the right of a colored man that, in the selection of jurors to pass upon his life, liberty and property, there shall be no exclusion of his race, and no discrimination against them because of color, has been asserted in a number of cases. 100 U. S. 313; 103 U. S. 370; 107 U. S. 110; 162 U. S. 565. 163 U. S. 544-5.

If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said in 93 N. Y. 438-48: "This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. . . . When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed." Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one can not be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States can not put them upon the same plane.

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states, some holding that any visible admixture of black blood stamps the person as belonging to the colored race, 5 Jones N. C. 1-11; others that it depends upon the preponderance of blood, 4 O. St. 354; 17 O. St. 665; and still others that the preponderance of white blood must only be in the proportion of three fourths. 14 Mich. 406; 80 Va. 538. But these are questions to be determined under the laws of each state and are not properly put in issue in this case. 163 U. S. 551-2.

The condition of the negro was such that he was not in the legal sense a person. Whether free or slave, he was something capable of being reduced to property, and, therefore, he did not fall within any category which would fit the genus man.

But assuming that it is necessary to classify him at all, it may be said that he belongs to the class of "nationals," and further was placed in a subclass by himself (under the Constitution as interpreted in the Dred Scott case), and that as member of that subclass he owed allegiance to the United States, but was incapable of possessing constitutional rights such as the right to sue in the Federal courts, which was expressly guaranteed to the citizens of the United States.

Thus political rights were accorded to some citizens and civil rights to all save the negro.

It was for the purpose of removing from our Constitution this disability that the Fourteenth Amendment was enacted. By it the negro stepped from the domain of zoology into that of history. 182 U. S. 84.

The Dred Scott case simply held that the negro was so low in the scale of humanity that the states could not, by conferring freedom upon him, make him capable of becoming a citizen of the United States in the broad or passive sense. He was, therefore, neither citizen nor subject, but a being who, under the Constitution, was something different and apart from the rest of humanity.

His anomalous position was thus described by Judge Taney: "In the opinion of the court the legislation and the histories of the times and the language used in the Declaration of Independence show that neither the class of persons who had been imported as slaves, nor

their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

"It is difficult at this day to realize the state of public opinion in relation to that unfortunate race which prevailed in the civilized and enlightened portion of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

"They had for more than a century been regarded as beings of an inferior order and altogether unfit to associate with the white race either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect; and that the negro might lawfully and justly be reduced to slavery for his benefit. He was bought and sold, as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

"And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and the English people. They not only seized them on the coast of Africa and sold them or held them in slavery for their own use, but they took them as ordinary articles of merchandise to every country where they could make a profit upon them and were far more extensively engaged in this commerce than any other nation in the world.

"The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different colonies, as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time." 19 How. 407-08. 182 U. S. 81-2.

### Indians "Wards of Nation"

The Supreme Court of the United States thus describes the status of the Indians.

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all tribes. *United States v. Kagama*, 118 U. S. 375, 384.

Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government. *Lone Wolf v. Hitchcock*, 187 U. S. 553, 565.

Citizenship, it is contended, was conferred upon the Creek Indians by the act of March 3, 1901, 31 Stat. 447, amending the act of February 8, 1887, 24 Stat. 390, c. 119, by adding to the Indians given citizenship under that act "every Indian in the Indian Territory." So amended, the act would read as to such Indian: "He is hereby declared to be a citizen of the United States and entitled to all the rights, privileges and immunities of such citizen." Is there anything incompatible with such citizenship in the continued control of Congress over the lands of the Indian? Does the fact of citizenship necessarily end the duty or power of Congress to act in the Indian's behalf?

Certain aspects of the question have already been settled by the decisions of this court. That Congress has full power to legislate concerning the tribal property of the Indians has been frequently affirmed. *221 U. S. 311*.

In *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307, Mr. Justice White, speaking for the court said:

"There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise by virtue of the act of 1898, has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the Government, even though the members of the tribe have been invested with the status of citizenship under recent legislation."

In *United States v. Rickert*, 188 U. S. 432, Mr. Justice Harlan, speaking for the court, said:

"These Indians are yet wards of the Nation, in a condition of pupillage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life and ultimately the privileges of citizenship." *221 U. S. 312*.

In the early dealings of the Government with the Indian tribes the latter were recognized as possessing some of the attributes of nations, with which the former made treaties, and the policy of the Government was, sometimes by treaties and sometimes by the use of force, to put a stop to the wanderings of these tribes and locate them on some definite territory or reservation, there establishing for them a communal or tribal life. While this policy was in force, and this location of wandering tribes was being accomplished, much of the legislation of Congress ran in the direction of the isolation of the Indians, preventing general intercourse between them and their white neighbors in order that they might not be defrauded or wronged through the superior cunning and skill of those neighbors. The practice of dealing with the Indian tribes as separate nations was changed by a proviso inserted in the Indian appropriation act of March 3, 1871, which reads: "No Indian nation or tribe within the territory of the United States shall be acknowledged



or recognized as an independent nation, tribe or power with whom the United States may contract by treaty." From that time on the Indian tribes and the individual members thereof have been subjected to the direct legislation of Congress, which, for some time thereafter, continued the policy of locating the tribes on separate reservations and perpetuating the communal or tribal life.

While during these years the exercise of certain powers by the Indian tribes was recognized, yet their subjection to the full control of the United States was often affirmed. In 187 U. S. 565, it was said: "Plenary authority over the tribal relations of the Indians has been exercised by congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government." And the conclusion thus reached was supported by the authority of several cases. It is true we ruled, when treaties between the Indian tribes and the United States were the subject of consideration, that "how the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." 6 Pet. 515, 582. And we also said that the obligations which the United States were under to the Indians called for "such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection." 119 U. S. 1, 28. But none of the decisions affirming the protection of the Indians questioned the full power of the Government to legislate in respect to them.

Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end. 197 U. S. 498-9.

There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. In *re Heff*, 197 U. S. 488, 504; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307; *Smith v. Goodell*, 20 Johns (N. Y.), 188; *Lowry v. Weaver*, 4 McLean, 82; *Whirlwind v. Von der Ahe*, 67 Mo. App. 628; *Taylor v. Drew*, 21 Arkansas, 485, 487. His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe and subject to the guardianship of the United States as to his political and personal status. This was clearly recognized in the leading case of *Jones v. Meehan*, 175 U. S. 1. There

it appeared that an Indian Chief owned in fee land which fronted on a stream. The chief died, and in 1891 his son and heir, during the continuance of the tribal organization, let the land to Meehan for ten years. In 1894 he again let the same property to Jones for twenty years. In that year the Secretary of the Interior was authorized by Congress to approve the lease to Jones if the latter would increase the rental. This he did, and with the assent of the Indian and the Secretary of the Interior a lease was made to Jones. In the litigation which followed Meehan relied on the first contract made in the exercise of the Indian's right of private property. Jones' relief on that made under Congressional authority, and although the Indian was a member of the tribe and much more subject to legislative power than these plaintiffs, the court held that the subsequent act could not relate back so as to interfere with the right of property which the Indian possessed and conveyed as an owner in fee, and while Congress had power to make treaties, it could not affect titles already granted by the treaty itself.

Nothing that was said in *Tiger v. Western Investment Co.*, 221 U. S. 286, is opposed to the same conclusion here. For that case did not involve property rights, but related solely to the power of Congress, to extend the period of the Indian's disability. The statute did not attempt to take his land or any right, member or appurtenance thereunto belonging. It left that as it was. 224 U. S. 677, 678.

Although an Indian may be made a citizen of the United States and of the State in which the reservation for his tribe is located, the United States may still retain jurisdiction over him for offenses committed within the limits of the reservation; and so held as to a crime committed by an Indian against another Indian on the Tulalip Indian Reservation in Washington, notwithstanding the Indians had received allotments under the treaties with the Omahas of March 16, 1834, and of Point Elliott of January 22, 1835. *Matter of Heff*, 197 U. S. 488, distinguished, the Indian in that case being an allottee under the general allotment act of February 8, 1887, c. 119, 24 Stat. 388.

Legislation of Congress is to be construed in the interest of the Indians; and, in the absence of a subjection in terms of the individual Indian to state laws and denial of further jurisdiction over him by the United States, a statute will not be construed as a renunciation of jurisdiction by the United States of crimes committed by Indians against Indians on Indian reservations. 215 U. S. 278, 279.

### **The Constitution of the Confederate States**

The Southern States having seceded from the Union, or attempted so to do, it was natural that they should form a new federation or confederation among themselves. This they did, and drafted, promulgated and adopted a new constitution. The constitution they adopted was almost identical with that which created the government from which they seceded. The Southern States, nor the people thereof, did not complain of and were not dissatisfied with any of its provisions. Their complaint was solely that they, and the people thereof, were deprived of their constitutional rights. Their

contention was that the Northern States, and the officers of the Federal Government, would not administer the government in accordance with the Constitution that created the government. They contended that the Southern States were then and would continue to be denied their constitutional rights, and they resolved to withdraw from the Union if the Union was unwilling to accord them their constitutional rights.

While it cannot be said that the Federal Government itself denied the Southern States their constitutional rights as to slavery, many of the Northern States did deny the Southern States, or the people thereof, the rights as to slavery which the Constitution indubitably guaranteed to them. These states were absolutely unwilling to longer tolerate slavery anywhere in the United States; no matter if the Constitution of the United States did commit that question to respective states. These states and these abolitionists insisted upon the Federal Government assuming control of the question of slavery,—the Constitution to the contrary notwithstanding. As a result of the Presidential election of 1860, the Southern States believed it to be determined on the part of the successful party to no longer observe the Constitution as to slavery; that the Federal Government would thereafter do what a number of the Northern States had already done—practically nullify the Constitution as to slavery;—and the Southern States resolved not to submit to it, and attempted to secede: just what the Northern States would have done if the Democrats had elected a President, and a majority of both houses can not be known but many believe that they would have seceded.

This was a great political mistake on the part of the Southern States. They should have remained in the Union, and the differences would have been settled peaceably. The great mistake was common to both,—the Northern States in failing to follow the advice of Washington, Jefferson, Madison, Lincoln and others who advised the states calling a new constitutional convention to revise the Constitution. Mr. Lincoln advised this course in his race for the Senate, in his race for the Presidency, and in his first inaugural address. Washington, Jefferson, Madison and others advised it, but the advice was not heeded: the differences were attempted to be adjusted by statutes, such as the Missouri Compromise, the Wilmot Proviso, the admission of one slave and one anti-slave state

at a time so as to preserve the equilibrium in the Senate. Public opinion, however, was constantly increasing against slavery and Congress had no power to enact the will of public opinion into law, because it was in violation of the Constitution. No law, written or unwritten, can be enforced in a free republican or democratic government, when that law is contrary to the fixed public opinion. "Public opinion sets bounds to all governments, and is the real sovereign of all free ones." Cases often arise when public opinion must be obeyed even by the government itself. Written constitutions must bend or break under this irresistible pressure.

Secession and the war between the states in 1861 was the case and occasion, when the government itself, and even the great Federal Charter, had to yield to the irresistible pressure of public opinion against slavery. The Constitution originally authorized slavery and secession, yet public opinion so changed until it would tolerate neither. Public opinion forced the Government, or those administering it, to deny the right of both. For years and years after the government was formed, the right of each state to secede from the Union, and to absolutely control the question of slavery within its own territory was not denied. Public opinion however ultimately began to change on both questions.

In the early thirties public opinion had probably changed to the extent that the majority of statesmen in the United States then were opposed to and held against the right of secession. While the public opinion as to the masses was, from the thirties on, against slavery, or the right of the states to control the question, there was never any change of opinion among the real statesmen on this question because it was conceded that the states did have the undoubted right to control slavery within their own respective borders. Until the 13th amendment was ratified which was after the war, there was a difference of opinion among the statesmen as to whether or not Congress could or should control the question as to territory of the United States, not within a state. Public opinion among the masses, however, became so strong and so acute that the Government and those administering it could or would not resist it,—and even the decision of the Supreme Court itself was disregarded.

During the thirties there developed trans-Atlantic forces which formed societies and raised funds and sent emissaries to the United States to preach, teach and aid the abolitionists.



The real object sought by this trans-Atlantic influence was not the abolition of slavery, but the dissolution of the Union. The question of slavery was used as a wedge which could be driven so as to split the Union wide open, which Great Britain then, and has ever, desired to accomplish, and this was the issue on which the European emissaries felt sure the Union could be divided, and they came very near succeeding. These trans-Atlantic forces gave aid and comfort to the abolitionists until they forced secession, and the formation of the Confederacy of the states: then they changed their aid and comfort to the states that had seceded, hoping thereby to dissolve the Union, and make one division of the Union their friends and allies against the other part of the Union.

The facts showing the intrigues on the part of these trans-Atlantic societies are shown by Mr. Calhoun in his reports and papers while Secretary of War and of State. In his writings, other than these state papers, he predicted that the real object and purpose of these trans-Atlantic aid societies was not in the interest of humanity, and the abolition of slavery, as claimed; but of dividing the Union so as to cripple the one great competitive power in the Western Hemisphere, which threatened the supremacy of Great Britain in the commerce of the world.

Great Britain has ever, and will ever, assail any government that threatens her supremacy in the commerce of the world. England has ever been a commercial nation. She has enjoyed the supremacy and control of the seas for centuries, and all of her alliances and leagues with other nations has ever been to preserve and maintain this supremacy. An exaggerated statement of England's attitude on this subject has been made by her enemies, "that she would sacrifice the liberties of every human being on earth in order to land one more ship load of wheat at her ports." While this is an exaggerated statement, it is true that the diplomacy of England for hundreds of years has been chiefly directed to maintaining the control of the seas and the commerce of the world. The moment any nation in the world has shown the desire or ability to compete with her, or to contest that supremacy, she has at once set about to prevent such other nation from becoming a dangerous competitor in the control of the commerce of the world.

So the influences which led to the war between the states were not wholly cis-Atlantic, some of them were trans-At-

lantic; and this trans-Atlantic influence was delighted when the Southern States seceded, and the same influences which had aided the cause of the abolitionists were well-wishers, if not active aiders, of the seceding states as to the war between the states

While Mr. Calhoun did not live to see this trans-Atlantic influence rejoice in what they thought was a dismemberment of the Union, he did prophesy and predict that it was disunion that it sought rather than the freedom of the slaves, and if secession had succeeded in the war his prophecy would have been fulfilled *in toto*, instead of only in part. Modern history has done Mr. Calhoun a great injustice in attributing to him a desire to destroy the Union, rather than to perpetuate it. No man, not even Mr. Webster or Mr. Lincoln, loved the Union any more sincerely than did Mr. Calhoun; nor did they desire more than he to perpetuate it. He advocated nullification chiefly because he believed it to be the only way to avoid secession or revolution, which both he and Mr. Webster agreed were inevitable if the Northern States continued to deny to the Southern States the rights guaranteed to them by the Constitution. While Mr. Webster, Mr. Jefferson, and Mr. Madison differed from him as to the Constitutional right of a state to nullify an act of Congress, or to exempt itself from the operation of a Federal statute, they all agreed with him that if the majority of the states continued to deny to the minority of the states their clear Constitutional rights, as they were doing as to slaves, that secession or revolution was inevitable—that the Constitution in this respect must be amended, or the rights of the states under it observed, or secession or revolution must follow. Mr. Calhoun believed that nullification was the only antidote for secession and revolution: in this, however, neither Webster, Clay, Madison or Jefferson agreed with him. Nullification, like the Missouri Compromise, for the time being did prevent secession or revolution, but it was only temporary. It did not remove the cause; to amend the Constitution to conform with public opinion as to slavery, or to remove or colonize the slaves, was the only thing that could give permanent or lasting relief.

A constitutional convention of all the states to revise and amend the Constitution as to slavery would have removed the cause of sectional strife, and have prevented secession and the war between the states. If the people themselves had been given the opportunity to act on the subject, they would have

yielded to the will and acts of their representatives as they did in 1787. From 1787 to 1860, public opinion as to slavery had undergone a radical change, and at the latter date, it was not in accord with the constitutional provisions as to slavery, as it was in 1787. The makers of the Constitution anticipated this change of public opinion, and provided for amending the Constitution to conform to it, but neither the states, nor the people thereof, would avail themselves of the privilege, but sought to find relief through compromise statutes and by ignoring the plain mandate of the Constitution, which eventuated in secession and the war between the states.

### **Some Facts Which History Has Ignored**

The Constitution proposed and unanimously adopted by the seceding states, which created the government under which they proposed to live, was almost an exact copy of the Federal Constitution which created the government from which they seceded.

This is conclusive proof that the Southern States and the people thereof had no complaint against the Federal Constitution, or the government created thereby. It was the fact that the Northern States, and those who administered the Federal government, denied and deprived the Southern States and the people thereof of their constitutional rights, of which the South complained. Partisan and sectional spirit and prejudice had become so strong that the bare numerical majorities of states and people thereof were not willing to observe or obey the written constitutional provisions as to slavery. Public opinion and prejudice in the Northern States had grown to be so strong that the people of the Northern States were not willing to be longer bound by the ligaments of a written constitution.

The same public opinion and prejudice had grown so strong in the Southern States that neither they nor the people thereof were willing to remain members or parts of a Federal government, in which they were denied their constitutional rights.

To what end and for what purpose was a written constitution, if its provisions were not to be observed by the majorities as well as by the minorities? The nature of the complaint of the Southern States was the same as that of the Colonists in 1776. Their chief complaint was that they were denied their constitutional rights under Magna Charta. Mr.

Webster had repeatedly warned the Northern States and the people thereof that if they continued to deny to the Southern States their constitutional rights as to slavery, the Southern States would be forced to secede,—a right not denied by leading statesmen of former days. After secession had failed, the war ended in favor of the Northern States, the Southern States having been compelled, by superior force, to surrender, the Northern States found themselves unable to enact their will into law because the Constitution prohibited their will being enacted into law. A congress composed almost entirely of Northern men, and entirely of those who were opposed to both secession and slavery, enacted scores of acts as to reconstruction, test oath laws, civil rights, etc., all of which were clearly unconstitutional, and many of them were so declared by the Supreme Court of the United States, which at that time did not have a member on it from the Southern States, or one who was in sympathy with the Southern States. Hence a change of the Constitution was found to be necessary in order to enforce the will of the Northern States, and three amendments, the thirteenth, fourteenth and fifteenth amendments, were proposed and adopted, without which the will of the Northern States never could have been legally enforced.

The Northern States fought to abolish slavery, and preserve the Union in spite of the Constitution; and the Southern States fought to preserve the Constitution if it destroyed the Union. If the Northern States had observed and obeyed the Constitution of the United States, there would never have been an occasion for secession or a war between the states. The only complaint that the Southern States ever made was that they were denied their constitutional rights. And that they were so denied there was no doubt. Their error was in seceding. They should have stayed in the Union, and joined with that portion of the Northern States, and the people thereof, who insisted upon changing the Constitution as to slavery so as to meet public opinion of that day. The result proved the prophecy of Madison when he said that "public opinion sets bounds to every government, and is the real sovereign in every free one."

Mr. Lincoln had truly said that the Union could not be preserved part slave and part free. The Constitution, however, expressly provided for just such a condition, part slave and part free, in that it left the question of slavery within each state to be settled and determined by the respective



states. He therefore advised a constitutional convention to change the Constitution, so that the Union and not the respective states could determine the question. This advice was however not heeded by the North or South, and Mr. Lincoln was forced to the choice of preserving the Constitution or the Union by force, and he chose to preserve the Union, and the war was inevitable. Had he chosen to have preserved the Constitution, the Northern States would have seceded. A change of the Constitution or secession was inevitable.

## **A COPY OF CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA**

We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent and federal government, establish justice, insure domestic tranquillity, and secure the blessings to ourselves and our posterity—invoking the favor and guidance of Almighty God—do ordain and establish this Constitution for the Confederate States of America.

### **ARTICLE I**

#### **SECTION 1**

All legislative powers herein delegated shall be vested in a Congress of the Confederate States, which shall consist of a Senate and House of Representatives.

#### **SECTION 2**

1. The House of Representatives shall be composed of members chosen every second year by the people of the several States; and the electors in each State shall be citizens of the Confederate States, and have the qualifications requisite for electors of the most numerous branch of the State Legislature; but no person of foreign birth, not a citizen of the Confederate States, shall be allowed to vote for any officer, civil or political, State or Federal.

2. No person shall be a Representative who shall not have attained the age of twenty-five years, and be a citizen of the Confederate States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several States, which may be included within this Confederacy, according to their respective numbers, which shall be determined, by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all slaves. The actual enumeration shall be made within three years after the first meeting of the Congress of the Confederate States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every fifty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State

of South Carolina shall be entitled to choose six; the State of Georgia ten; the State of Alabama nine; the State of Mississippi seven; the State of Louisiana six; and the State of Texas six.

4. When vacancies happen in the representation from any State, the Executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment; except that any judicial or other Federal officer, resident and acting solely within the limits of any State, may be impeached by a vote of two-thirds of both branches of the Legislature thereof.

### SECTION 3

1. The Senate of the Confederate States shall be composed of two Senators from each State, chosen for six years by the Legislature thereof, at the regular session next immediately preceding the commencement of the term of service; and each Senator shall have one vote.

2. Immediately after they shall be assembled, in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year; of the second class at the expiration of the fourth year; and of the third class at the expiration of the sixth year; so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the Legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the Legislature which shall then fill such vacancies.

3. No person shall be a Senator who shall not have attained the age of thirty years, and be a citizen of the Confederate States; and who shall not, when elected, be an inhabitant of the State for which he shall be chosen.

4. The Vice-President of the Confederate States shall be President of the Senate, but shall have no vote unless they are equally divided.

5. The Senate shall choose their officers; and also a President *pro tempore* in the absence of the Vice-President, or when he shall exercise the office of the President of the Confederate States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the Confederate States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit, under the Confederate States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment and punishment according to law.

### SECTION 4

1. The times, places and manners of holding elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof, subject to the provisions of this Constitution; but the Congress may, at any time, by law, make or alter such regulations, except as to the times and places of choosing Senators.

2. The Congress shall assemble at least once in every year; and such meeting shall be on the first Monday in December, unless they shall, by law, appoint a different day.

SECTION 5

1. Each House shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such a manner and under such penalties as each House may provide.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds of the whole number expel a member.

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION 6

1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the Confederate States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

2. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the Confederate States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the Confederate States shall be a member of either House during his continuance in office. But Congress may, by law, grant to the principal officer in each of the Executive Departments a seat upon the floor of either House, with the privilege of discussing any measures appertaining to his department.

SECTION 7

1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.

2. Every bill which shall have passed both Houses, shall, before it becomes a law, be presented to the President of the Confederate States; if he approves, he shall sign it; but if not, he shall return it, with his objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. But in all such cases,

the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bills shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by their adjournment, prevent its return; in which case it shall not be a law. The President may approve any appropriation and disapprove any other appropriation in the same bill. In case he shall, in signing the bill, designate the appropriations disapproved; and shall return a copy of such appropriations, with his objections, to the House in which the bill shall have originated; and the same proceedings shall then be had as in case of other bills disapproved by the President.

3. Every order, resolution or vote, to which the concurrence of both Houses may be necessary, (except on a question of adjournment,) shall be presented to the President of the Confederate States; and before the same shall take effect, shall be approved by him; or being disapproved by him, shall be re-passed by two-thirds of both Houses, according to the rules and limitations prescribed in case of a bill.

#### SECTION 8

The Congress shall have power—

1. To lay and collect taxes, duties, imposts, and excises, for revenue necessary to pay the debts, provide for the common defence, and carry on the government of the Confederate States; but no bounties shall be granted from the treasury; nor shall any duties or taxes on importations from foreign nations be laid to promote or foster any branch of industry; and all duties, imposts, and excises, shall be uniform **throughout the Confederate States:**

2. To borrow money on the credit of the Confederate States:

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes; but neither this, nor any other clause contained in the constitution, shall ever be construed to delegate the power to Congress to appropriate money for any internal improvement intended to facilitate commerce; except for the purpose of furnishing lights, beacons, and buoys, and other aids to navigation upon the costs, and the improvement of harbours and the removing of obstructions in river navigation, in all which cases, such duties shall be laid on the navigation facilitated thereby, as may be necessary to pay the costs and expenses thereof.

4. To establish uniform laws of naturalization, and uniform laws on the subject of bankruptcies, throughout the Confederate States; but no law of Congress shall discharge any debt contracted before the passage of the same.

5. To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures.

6. To provide for the punishment of counterfeiting the securities and current coin of the Confederate States.

7. To establish post-offices and post-routes; but the expenses of the Post-office Department, after the first day of March in the year of our Lord eighteen hundred and sixty-three, shall be paid out of its own revenues.



8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

9. To constitute tribunals inferior to the Supreme Court.

10. To define and punish piracies and felonies committed on the high seas, and offences against the law of nations.

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

12. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.

13. To provide and maintain a navy.

14. To make rules for the government and regulation of the land and naval forces.

15. To provide for calling forth the militia to execute the laws of the Confederate States, suppress insurrections, and repel invasions.

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the Confederate States; reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

17. To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of one or more States and the acceptance of Congress, become the seat of the government of the Confederate States: and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings: and

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the Confederate States, or in any department or officer thereof.

#### SECTION 9

1. The importation of negroes of the African race, from any foreign country other than the slaveholding States or Territories of the United States of America, is hereby forbidden; and Congress is required to pass such laws as shall effectually prevent the same.

2. Congress shall also have power to prohibit the introduction of slaves from any State not a member of, or Territory not belonging to, this Confederacy.

3. The privileges of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

4. No bill of attainder, *ex post facto* law, or law denying or impairing the right of property in negro slaves shall be passed.

5. No capitation or other tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

6. No tax or duty shall be laid on articles exported from any State, except by a vote of two-thirds of both Houses.

7. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.

8. No money shall be drawn from the treasury, but in consequence

of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

9. Congress shall appropriate no money from the treasury except by a vote of two-thirds of both Houses, taken by yeas and nays, unless it be asked and estimated for by some one of the heads of departments, and submitted to Congress by the President; for the purpose of paying its own expenses and contingencies; or for the payment of claims against the Confederate States, the justice of which shall have been judicially declared by a tribunal for the investigation of claims against the government, which it is hereby made the duty of Congress to establish.

10. All bills appropriating money shall specify in federal currency the exact amount of each appropriation and purposes for which it is made; and Congress shall grant no extra compensation to any public contractor, officer, agent or servant, after such contract shall have been made or such service rendered.

11. No title of nobility shall be granted by the Confederate States; and no person holding any office of profit or trust under them shall without the consent of the Congress, accept of any present, emolument, office or title of any kind whatever, from any king, or foreign state.

12. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and petition the government for a redress of grievances.

13. A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

14. No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

15. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

16. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor be compelled, in any criminal case, to be a witness against himself; nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

17. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

18. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact so tried by a jury shall be otherwise re-examined in any court of the Confederacy, than according to the rules of common law.

19. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

20. Every law, or resolution having the force of law, shall relate to but one subject, and that shall be expressed in the title.

#### SECTION 10.

1. No State shall enter any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, or *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the Confederate States; and all such laws shall be subject to the revision and control of Congress.

3. No State shall, without the consent of Congress, lay any duty on tonnage, except on sea-going vessels, for the improvements of its rivers and harbors navigated by the said vessels; but such duties shall not conflict with any treaties of the Confederate States with foreign nations; and any surplus revenue, thus derived, shall, after making such improvement, be paid into the common treasury. Nor shall any State keep troops or ships-of-war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

### ARTICLE II

#### SECTION 1

1. The executive power shall be vested in a President of the Confederate States of America. He and the Vice-President shall hold their offices for the term of six years; but the President shall not be re-eligible. The President and Vice-President shall be elected as follows:

2. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative or person holding an office of trust or profit under the Confederate States, shall be appointed an elector.

3. The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit, sealed, to the seat of

the government of the Confederate States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then, from the persons having the fewest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States—the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.

4. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then, from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.

5. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the Confederate States.

6. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the Confederate States.

7. No person except a natural born citizen of the Confederate States, or a citizen thereof at the time of the adoption of this Constitution, or a citizen thereof born in the United States prior to the 20th of December, 1860, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years, and been fourteen years a resident within the limits of the Confederate States, as they may exist at the time of his election.

8. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President; and the Congress may, by law, provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President; and such officer shall act accordingly, until the disability be removed or a President shall be elected.

9. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive within that period any other emolument from the Confederate States, or any of them.



10. Before he enters on the execution of his office, he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the Confederate States, and will, to the best of my ability, preserve, protect, and defend the Constitution."

#### SECTION 2

1. The President shall be commander-in-chief of the army and navy of the Confederate States, and of the militia of the several States, when called into the actual service of the Confederate States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the Confederate States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties; provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the Confederate States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may, by law, vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The principal officer in each of the executive departments, and all persons connected with the diplomatic service, may be removed from office at the pleasure of the President. All other civil officers of the executive department may be removed at any time by the President, or other appointing power, when their services are unnecessary, or for dishonesty, incapacity, inefficiency, misconduct, or neglect of duty; and when so removed, the removal shall be reported to the Senate, together with the reasons therefor.

4. The President shall have power to fill vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session; but no person rejected by the Senate shall be re-appointed to the same office during their ensuing recess.

#### SECTION 3

1. The President shall, from time to time, give to the Congress information of the state of the Confederacy, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the Confederate States.

#### SECTION 4

1. The President, Vice-President, and all civil officers of the Confederate States, shall be removed from office on impeachment, for and conviction of, treason, bribery, or other high crimes and misdemeanors.

## ARTICLE III

## SECTION 1

1. The judicial power of the Confederate States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time, ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

## SECTION 2

1. The judicial power shall extend to all cases arising under this Constitution, the laws of the Confederate States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the Confederate States shall be a party; to controversies between two or more States; between a State and citizens of another State, where the State is plaintiff; between citizens claiming lands under grants of different States; and between a State or the citizens thereof, and foreign states, citizens or subjects; but no State shall be sued by a citizen or subject of any foreign state.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

## SECTION 3

1. Treason against the Confederate States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attained.

## ARTICLE IV

## SECTION 1

1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION 2

1. The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States; and shall have the right of transmit and adjourn in any State of this Confederacy, with their slaves and other property; and the right of property in said slaves shall not be thereby impaired.

2. A person charged in any State with treason, felony, or other crime against the laws of such State, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

3. No slave or other person held to service or labor in any State or Territory of the Confederate States, under the laws thereof, escaping or lawfully carried into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such slave belongs, or to whom such service or labor may be due.

SECTION 3.

1. Other States may be admitted into this Confederacy by a vote of two-thirds of the whole House of Representatives and two-thirds of the Senate, the Senate voting by States; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the jurisdiction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress.

2. The Congress shall have the power to dispose of and make all needful rules and regulations concerning the property of the Confederate States, including the lands thereof.

3. The Confederate States may acquire new territory; and Congress shall have power to legislate and provide governments for the inhabitants of all territory belonging to the Confederate States, lying without the limits of the several States; and may permit them, at such times, and in such manner as it may by law provide, to form States to be admitted into the Confederacy. In all such territory, the institution of negro slavery as it now exists in the Confederate States, shall be recognized and protected by Congress and by the territorial government; and the inhabitants of the several Confederate States and Territories shall have the right to take to such territory any slaves lawfully held by them in any of the States or Territories of the Confederate States.

4. The Confederate States guarantee to every State that now is, or hereafter may become, a member of this Confederacy, a republican form of government; and shall protect each of them against invasion; and on application of the legislature, (or of the executive, when the legislature is not in session,) against domestic violence.

ARTICLE V

SECTION 1

1. Upon the demand of any three States, legally assembled in their several conventions, the Congress shall summon a convention of all the States, to take into consideration such amendments to the Consti-

tution as the said States shall concur in suggesting at the time when the said demand is made; and should any of the proposed amendments to the Constitution be agreed on by the said convention—voting by States—and the same be ratified by the legislatures of two-thirds of the several States, or by conventions in two-thirds thereof—as the one, or the other mode of ratification may be proposed by the general convention—they shall thenceforward form a part of this Constitution. But no State shall, without its consent, be deprived of its equal representation in the Senate.

#### ARTICLE VI

1. The Government established by this Constitution is the successor of the Provisional Government of the Confederate States of America, and all the laws passed by the latter shall continue in force until the same shall be repealed or modified: and all the officers appointed by the same shall remain in office until their successors are appointed and qualified, or the offices abolished.

2. All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the Confederate States under this Constitution, as under the Provisional Government.

3. This Constitution, and the laws of the Confederate States made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the Confederate States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

4. The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the Confederate States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the Confederate States.

5. The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people of the several States.

6. The powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people thereof.

#### ARTICLE VII.

1. The ratification of the conventions of five States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

2. When the five States shall have ratified this Constitution, in the manner before specified, the Congress under the Provisional Constitution shall prescribe the time for holding the election of President and Vice-President; and for the meeting of the Electoral College; and for counting the votes, and inaugurating the President. They shall, also, prescribe the time for holding the first election of members of Congress under this Constitution, and the time for assembling the same. Until the assembling of such Congress, the Congress under the Provisional



Constitution shall continue to exercise the legislative powers granted them; not extending beyond the time limited by the Constitution of the Provisional Government.

Adopted unanimously by the Congress of the Confederate States of South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana and Texas, sitting in Convention at the capitol, in the city of Montgomery, Alabama, on the eleventh day of March, in the year Eighteen Hundred and Sixty-One.

HOWELL COBB,  
*President of the Congress.*

*South Carolina*

R. BARNWELL RHETT  
C. G. MEMMINGER  
WM. PORCHER MILES  
JAMES CHESTNUT, JR.

R. W. BARNWELL  
WILLIAM W. BOYCE  
LAWRENCE M. KEITT  
T. J. WITHERS

*Georgia*

FRANCIS S. BARTOW  
MARTIN J. CRAWFORD

BENJAMIN H. HILL  
THOS. R. R. COBB

*Florida*

JACKSON MORTON  
J. PATTON ANDERSON

JAS. B. OWENS

*Alabama*

RICHARD W. WALKER  
ROBT. H. SMITH  
COLIN J. McRAE  
WILLIAM P. CHILTON  
STEPHEN F. HALE

DAVID P. LEWIS  
THO. FEARN  
JNO. GILL SHORTER  
J. L. M. CURRY

*Mississippi*

ALEX. M. CLAYTON  
JAMES T. HARRISON  
WILLIAM S. BARRY  
W. S. WILSON

WALKER BROOKE  
W. P. HARRIS  
J. A. P. CAMPBELL

*Louisiana*

ALEX. DE CLOUDET  
C. M. CONRAD

DUNCAN F. KENNER  
HENRY MARSHALL

*Texas*

JOHN HEMPHILL  
THOMAS N. WAUL  
JOHN G. REAGAN  
WILLIAMSON S. OLDHAM

LOUIS T. WIGFALL  
JOHN GREGG  
WILLIAM BECK OCHILTREE

**Notes on the Confederate Constitution**

The Confederate Constitution was modeled on the Constitution of the United States, with only such changes as experience had suggested for better practical working or greater perspicuity. The chief changes are easily noted. In accordance with the original draft of the Constitution of 1787, the official term of the President was fixed at six instead of four years, and it was provided that he should not be eligible for re-election. The President was empowered to remove his cabinet officers

or diplomatic agents; but, in all other cases, removals from office could be made only for cause, and the cause was to be reported to the Senate.

Congress was authorized to provide for the admission of cabinet officers to a seat in either house, with the privilege of participating in debates pertaining to their departments. Unfortunately, this wise and judicious provision remained inoperative, owing to the failure of Congress to provide the appropriate legislation.

Protective tariff-duties, bounties, and extra compensation for services of Government officials were altogether prohibited.

The President was vested with the power to veto any appropriation in a bill without thereby disapproving any other appropriation in the same bill.

Any two or more States were authorized to enter into compact for the improvement of navigable rivers flowing through or between them.

A vote of two-thirds of each house—the Senate voting by States—was required for the admission of a new State.

With regard to amendments to the Constitution, it was made obligatory on Congress, on the demand of any three States concurring in the proposed amendment or amendments, to summon a convention of all the States to consider and act upon them, voting by States, but restricted in its action to the particular proposition thus submitted. If approved by such convention, the amendments were to be subject to final ratification by two-thirds of the States.

With regard to slavery and the slave-trade the provisions of the Constitution furnished an effective answer to the assertion, so often made, that the Confederacy was founded on slavery and intended to perpetuate and extend it. Property in slaves, already existing, was recognized and guaranteed, just as it was by the Constitution of the United States; and the rights of such property in the common Territories were protected against any such hostile discrimination as had been attempted in the Union. But the extension of slavery, in the only practical sense of that phrase, was more distinctly and effectively precluded by the Confederate than by the Federal Constitution. The further importation of negroes from any country, other than the slaveholding States and Territories of the United States, was peremptorily prohibited, and Congress was further endowed with the power to prohibit the introduction of slaves from any State or Territory not belonging to the Confederacy.

### **The Confederacy of 1861**

On February 9th, Jefferson Davis, of Mississippi, was elected President, and Alexander H. Stephens, of Georgia, Vice-President, of the Confederacy. On the 15th, Congress passed a resolution declaring “that it is the sense of this Congress that a commission of three persons be appointed by the President-elect, as early as may be convenient after his inauguration, and sent to the Government of the United States of America, for the purpose of negotiating friendly relations between that government and the Confederate States of Amer-

ica, and for the settlement of all questions of disagreement between the two governments upon principles of right, justice, equity and good faith. February 25th, an act was passed "to declare and establish the free navigation of the Mississippi River," which prevented any interference with the passage of Northern as well as Southern vessels upon that stream.

### **Status of Laws of the Confederate States**

All laws of the Confederate government, or of the States as makers thereof, were held to be null and void, but acts dealing merely with property rights, and even private personal rights, such as marriage and divorce, and judgments of the courts as to such rights, were treated as valid. 8 Wall. 11; 22 Wall. 308; 94 U. S. 434; 96 U. S. 580.

As to the right of citizens of these States to a jury trial, when charged as for disloyal acts, see 1 Wall. 243.

## **A COPY OF THE RECONSTRUCTION ACTS**

### **AN ACT**

To provide for the more efficient government of the rebel states.

WHEREAS, no legal state governments or adequate protection for life or property now exists in the rebel states of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas and Arkansas; And whereas, it is necessary that peace and good order should be enforced in said states until loyal and republican state governments can be legally established; Therefore—

*Be it enacted by the senate and house of representatives of the United States of America in congress assembled,* That said rebel states shall be divided into military districts and made subject to the military authority of the United States as hereinafter prescribed; and for that purpose Virginia shall constitute the first district; North Carolina and South Carolina the second district; Georgia, Alabama and Florida the third district; Mississippi and Arkansas the fourth district; and Louisiana and Texas the fifth district.

Sec. 2. *And be it further enacted,* That it shall be the duty of the president to assign to the command of each of said districts an officer of the army not below the rank of brigadier-general, and to detail a sufficient military force to enable such officer to perform his duties and enforce his authority within the district to which he is assigned.

Sec. 3. *And be it further enacted,* That it shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, and to this end he may allow local civil tribunals to take jurisdiction of and try offenders, or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose, and all interference, under color of state authority, with the exercise of military authority under this act, shall be null and void.

Sec. 4. *And be it further enacted,* That all persons put under military arrest by virtue of this act shall be tried without unnecessary

delay, and no cruel or unusual punishment shall be inflicted; and no sentence of any military commission or tribunal hereby authorized, affecting the life or liberty of any person, shall be executed until it is approved by the officer in command of the district, and the laws and regulations for the government of the army shall not be affected by this act, except in so far as they conflict with its provisions; *Provided*, That no sentence of death, under the provisions of this act, shall be carried into effect without the approval of the president.

Sec. 5. *And be it further enacted*, That when the people of any one of said rebel states shall have formed a constitution of government in conformity with the constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said state twenty-one years old and upwards, of whatever race, color, or previous condition, who have been resident in said state for one year previous to the day of such election, except such as may be disfranchised for participation in the rebellion, or for felony at common law; and when such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates; and when such constitution shall be ratified by a majority of the persons voting on the question of ratification who are qualified as electors for delegates; and when such constitution shall have been submitted to congress for examination and approval, and congress shall have approved the same; and when said state, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the constitution of the United States proposed by the thirty-ninth congress, and known as article fourteen; and when said article shall have become a part of the constitution of the United States, said state shall be declared entitled to representation in congress, and senators and representatives shall be admitted therefrom on their taking the oath prescribed by law; and then and thereafter the preceding sections of this act shall be inoperative in said state; *Provided*, that no person excluded from the privilege of holding office by said proposed amendment to the constitution of the United States shall be eligible to election as a member of the convention to frame a constitution for any of said rebel states, nor shall any such person vote for members of such convention.

Sec. 6. *And be it further enacted*, That until the people of said rebel states shall be by law admitted to representation in the congress of the United States, any civil government which may exist therein shall be deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same; and in all elections to any office under such provisional governments all persons shall be entitled to vote, and none others, who are entitled to vote under the fifth section of this act; and no person shall be eligible to any office under any such provisional governments who would be disqualified from holding office under the provisions of the third article of said constitutional amendment.

SCHUYLER COLFAX,

*Speaker of the House of Representatives.*

LA FAYETTE S. FOSTER,

*President of the Senate pro tempore.*



IN HOUSE OF REPRESENTATIVES, March 2, 1867.

The president of the United States having returned to the house of representatives, in which it originated, the bill entitled "An act to provide for the more efficient government of the rebel states," with his objections thereto, the house of representatives proceeded, in pursuance of the constitution, to reconsider the same, and

*Resolved*, That the said bill do pass, two-thirds of the house of representatives agreeing to pass the same.

Attest:

EDWARD MCPHERSON.

*Clerk H. R. U. S.*

IN SENATE OF THE UNITED STATES, March 2, 1867.

The senate having proceeded, in pursuance of the constitution, to reconsider the bill entitled "An act to provide for the more efficient government of the rebel states," returned to the house of representatives by the president of the United States with his objections, and sent by the house of representatives to the senate with the message of the president returning the bill,

*Resolved*, That the bill do pass, two-thirds of the senate agreeing to pass the same.

Attest:

J. W. FORNEY,

March 2, 1867.

*Secretary of the Senate.*

(14 U. S. Stats. at Large, 428.)

#### AN ACT

Supplementary to an act entitled "An act to provide for the more efficient government of the rebel states," passed March second, eighteen hundred and sixty-seven, and to facilitate restoration.

*Be it enacted by the senate and house of representatives of the United States of America in congress assembled*, That before the first day of September, eighteen hundred and sixty-seven, the commanding general in each district defined by an act entitled "An act to provide for the more efficient government of the rebel states," passed March second, eighteen hundred and sixty-seven, shall cause a registration to be made of the male citizens of the United States, twenty-one years of age and upwards, resident in each county or parish in the state or states included in his district, which registration shall include only those persons who are qualified to vote for delegates by the act aforesaid, and who shall have taken and subscribed the following oath or affirmation: "I, . . . . ., do solemnly swear (or affirm), in the presence of Almighty God, that I am a citizen of the state of . . . . .; that I have resided in said state for . . . . . months next preceding this day, and now reside in the county of . . . . . or the parish of . . . . ., in said state (as the case may be); that I am twenty-one years old; that I have not been disfranchised for participation in any rebellion or civil war against the United States, nor for felony committed against the laws of any state or of the United States; that I have never been a member of any state legislature, nor held any executive or judicial office in any state and afterwards engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof; that I have never taken an oath as a member of congress of the United States, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any

state, to support the constitution of the United States, and afterwards engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof; that I will faithfully support the constitution and obey the laws of the United States, and will, to the best of my ability, encourage others so to do—So help me God;" which oath or affirmation may be administered by any registering officer.

Sec. 2. *And be it further enacted*, That after the completion of the registration hereby provided for in any state, at such time and places therein as the commanding general shall appoint and direct, of which at least thirty days' public notice shall be given, an election shall be held of delegates to a convention for the purpose of establishing a constitution and civil government for such state loyal to the Union, said convention in each state, except Virginia, to consist of the same number of members as the most numerous branch of the state legislature of such state in the year eighteen hundred and sixty, to be apportioned among the several districts, counties, or parishes of such state by the commanding general, giving to each representation in the ratio of voters registered as aforesaid as nearly as may be. The convention in Virginia shall consist of the same number of members as represented the territory now constituting Virginia in the most numerous branch of the legislature of said state in the year eighteen hundred and sixty, to be apportioned as aforesaid.

Sec. 3. *And be it further enacted*, That at said election the registered voters of each state shall vote for or against a convention to form a constitution therefor under this act. Those voting in favor of such a convention shall have written or printed on the ballots by which they vote for delegates, as aforesaid, the words "For a convention," and those voting against such a convention shall have written or printed on such ballots the words "Against a convention." The persons appointed to superintend said election, and to make return of the votes given thereat, as herein provided, shall count and make return of the votes given for and against a convention; and the commanding general to whom the same shall have been returned shall ascertain and declare the total vote in each state for and against a convention. If a majority of the votes given on that question shall be for a convention, then such convention shall be held as hereinafter provided; but if a majority of said votes shall be against a convention, then no such convention shall be held under this act; *Provided*, that such convention shall not be held unless a majority of all such registered voters shall have voted on the questions of holding such convention.

Sec. 4. *And be it further enacted*, That the commanding general of each district shall appoint as many boards of registration as may be necessary, consisting of three loyal officers or persons, to make and complete the registration, superintend the election, and make return to him of the votes, list of voters, and of the persons elected as delegates by a plurality of the votes cast at said election; and upon receiving said returns he shall open the same, ascertain the persons elected as delegates, according to the returns of the officers who conducted said election, and make proclamation thereof; and if a majority of the votes given on that question shall be for a convention, the commanding general, within sixty days from the date of election, shall notify the delegates to assemble in convention, at a time and place to be mentioned in the notification, and said convention, when organized,

shall proceed to frame a constitution and civil government according to the provisions of this act, and the act to which it is supplementary; and when the same shall have been so framed, said constitution shall be submitted by the convention for ratification to the persons registered under the provisions of this act at an election to be conducted by the officers or persons appointed, or to be appointed by the commanding general as hereinbefore provided, and to be held after the expiration of thirty days from the date of notice thereof, to be given by said convention; and the returns thereof shall be made to the commanding general of the district.

Sec. 5. *And be it further enacted*, That if, according to said returns, the constitution shall be ratified by a majority of the votes of the registered electors qualified as herein specified, cast at said election, at least one-half of all the registered voters voting upon the question of such ratification, the president of the convention shall transmit a copy of the same, duly certified, to the president of the United States, who shall forthwith transmit the same to congress, if then in session, and if not in session, then immediately upon its next assembling; and if it shall moreover appear to congress that the election was one at which all the registered and qualified electors in the state had an opportunity to vote freely, and without restraint, fear, or the influence of fraud, and if the congress shall be satisfied that such constitution meets the approval of a majority of all the qualified electors in the state, and if the said constitution shall be declared by congress to be in conformity with the provisions of the act to which this is supplementary, and the other provisions of said act shall have been complied with, and the said constitution shall be approved by congress, the state shall be declared entitled to representation, and senators and representatives shall be admitted therefrom as therein provided.

Sec. 6. *And be it further enacted*, That all elections in the states mentioned in the said "Act to provide for the more efficient government of the rebel states," shall, during the operation of said act, be by ballot; and all officers making the said registration of voters, and conducting said elections, shall, before entering upon the discharge of their duties, take and subscribe the oath prescribed by the act approved July second, eighteen hundred and sixty-two, entitled "An act to prescribe an oath of office;" *Provided*, that if any person shall knowingly and falsely take and subscribe any oath in this act prescribed, such person so offending, and being thereof duly convicted, shall be subject to the pains, penalties, and disabilities, which by law are provided for the punishment of the crime of willful and corrupt perjury.

Sec. 7. *And be it further enacted*, That all expenses incurred by the several commanding generals, or by virtue of any orders issued, or appointments made by them, under or by virtue of this act, shall be paid out of any moneys in the treasury not otherwise appropriated.

Sec. 8. *And be it further enacted*, That the convention for each State shall prescribe the fees, salary, and compensation to be paid to all delegates and other officers and agents herein authorized or necessary to carry into effect the purposes of this act, not herein otherwise provided for, and shall provide for the levy and collection of such taxes on the property in such state as may be necessary to pay the same.

Sec. 9. *And be it further enacted*, That the word "article," in the sixth section of the act to which this is supplementary, shall be construed to mean "section."

SCHUYLER COLFAX,  
*Speaker of the House of Representatives.*  
B. F. WADE,  
*President of the Senate pro tempore.*

IN THE HOUSE OF REPRESENTATIVES, U. S., March 23, 1867.

The president of the United States having returned to the house of representatives, in which it originated, the bill entitled "An act supplementary to an act entitled 'An act to provide for the more efficient government of the rebel states,' passed March second, eighteen hundred and sixty-seven, and to facilitate restoration," with his objections thereto, the house of representatives proceeded, in pursuance of the constitution, to reconsider the same; and—

*Resolved*, That the said bill do pass, two-thirds of the house of representatives agreeing to pass the same.

Attest:

EDWD. MCPHERSON,  
*Clerk H. R. U. S.*

IN SENATE OF THE UNITED STATES, March 23, 1867.

The senate having proceeded, in pursuance of the constitution, to reconsider the bill entitled "An act supplementary to an act entitled 'An act to provide for the more efficient government of the rebel states,' passed March second, eighteen hundred and sixty-seven, and to facilitate restoration," returned to the house of representatives by the president of the United States, with his objections, and sent by the house of representatives to the senate, with the message of the president returning the bill—

*Resolved*, That the bill do pass, two-thirds of the senate agreeing to pass the same.

Attest:

J. W. FORNEY,  
*Secretary.*

March 23, 1867.

(15 U. S. Stats. at Large. 2.)

### **"Reconstruction Acts" and Reconstruction**

After the surrender of the Southern States in the war between the States, Congress passed many acts known as Reconstruction Acts. The titles of many of these Acts were "To Provide for a More Efficient Government of the Rebel States." They were *sui generis* as American or English Statutes. They read more like the edicts of merciless tyrants than enactments of laws by civilized and Christianized law-makers. They were all vetoed by President Johnson; but easily passed over his veto, so great was the sectional passion and prejudice then among the States. They were cruelly, tyrannically, and arbitrarily enforced, as they were intended so to be, until declared void by the Supreme Court of the United States. It is difficult to understand how any American would ever have supposed that they were Constitutional. They violated nearly



every fundamental principle of our Constitution and of all Federal or Republican form of Government. Congress thoroughly usurped all the Executive and Judicial powers of the Government and far exceeded those granted to itself. As before stated, the Acts were mere edicts and decrees of Congress as a Court convicting innocence without trials and hearings. The bills put millions of intelligent people under absolute control of military despots and ignorant negroes, who neither knew nor cared for a single principle of Civil Government. The Acts, declared and decreed, contrary to the National and State Constitutions, and undoubted facts, that there existed in no one of the thirteen States a legal form of Government. The military rule, established by the bills, was not to enforce the laws of a nation or state, nor to prevent violations of such laws, but to coerce the intelligence and morality of those States to submit to arbitrary, cruel and outrageous oppression by a horde of ignorant negroes and a field of office-seekers who had and would migrate to those States for the loaves and fishes of the offices. The President, in his veto, thus truthfully, justly and severely criticised some of the provisions of these tyrannical acts:

It is plain that the authority here given to the military officer amounts to absolute despotism. But to make it still more unendurable, the bill provides that it may be delegated to as many subordinates as he chooses to appoint, for it declares that he shall "punish or cause to be punished." Such a power has not been wielded by any monarch in England for more than five hundred years. In all that time no people who speak the English language have borne such servitude. It reduces the whole population of ten States—all persons, of every color, sex, and condition, and every stranger within their limits—to the most abject degrading slavery. No master ever had a control so absolute over the slaves as this bill gives to the military officers over both white and colored persons. *Messages and Papers of the Presidents, Vol. VI, p. 502.*

As to the Constitutionality of the measures, the President in his veto message, says:

Have we the power to establish and carry into execution a measure like this? I answer: Certainly not, if we derive our authority from the Constitution and if we are bound by the limitations which it imposes.

This proposition is perfectly clear, that no branch of the Federal Government—executive, legislative, or judicial—can have any just powers except those which it derives through and exercises under the organic law of the Union. Outside of the Constitution we have no legal authority more than private citizens, and in it we have only so much as that instrument gives us. This broad principle limits all our functions and applies to all subjects. It protects not only the citizens

of States which are within the Union, but it shields every human being who comes or is brought under our jurisdiction. We have no right to do in one place more than in another that which the Constitution says we shall not do at all. If, therefore, the Southern States were in truth out of the Union, we could not treat their people in a way which the fundamental law forbids. *Messages and Papers of the Presidents, Vol. VI, p. 503.*

It will be observed that of the three kinds of military jurisdiction which can be exercised or created under our Constitution there is but one that can prevail in time of peace, and that is the code of laws enacted by Congress for the government of national forces. That body of military law has no application to the citizen, nor even to the citizen soldier enrolled in the militia in time of peace. But this bill is not a part of that sort of military law, for that applies only to the soldier and not to the citizen, whilst, contrariwise, the military law provided by this bill applies only to the citizen and not to the soldier. *Messages and Papers of the Presidents, Vol. VI, p. 505.*

It seems to be scarcely possible that anyone should seriously believe this consistent with a Constitution which declares in simple, plain, and unambiguous language that all persons shall have that right and that no person shall ever in any case be deprived of it. The Constitution also forbids the arrest of the citizen without judicial warrant founded on probable cause. This bill authorizes an arrest without warrant, at the pleasure of the military commander. The Constitution declares that "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury." This bill holds every person not a soldier answerable for all crimes and all charges without a presentment. The Constitution declares that "no person shall be deprived of life, liberty, or property without due process of law." This bill sets aside all process of law, and makes the citizen answerable in his person and property to the will of one man, and as to his life to the will of two. Finally, the Constitution declares that "the privilege of the writ of *habeas corpus* shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it," whereas this bill declares martial law (which of itself suspends this great writ) in time of peace, and authorizes the military to make the arrest, and gives to the prisoner only one privilege, and that is a trial "without unnecessary delay." He has no hope of release from custody, except the hope, such as it is, of release by acquittal before military commission. *Messages and Papers of the Presidents, Vol. VI, p. 506.*

The purpose and object of the bill—the general intent which pervades it from beginning to end—is to change the entire structure and character of the State governments and to compel them by force to the adoption of organic laws and regulations which they are unwilling to accept if left to themselves. The negroes have not asked for the privilege of voting; the vast majority of them have no idea of what it means. This bill not only thrusts it into their hands, but compels them, as well as the whites, to use it in a particular way. If they do not form a constitution with prescribed articles in it and afterwards elect a legislature which will act upon certain measures in a prescribed

way, neither blacks nor whites can be relieved from slavery which the bill imposes upon them. *Messages and Papers of the Presidents, Vol. VI, p. 507.*

The bill also denies the legality of the governments of ten of the states which participated in the ratification of the amendment to the Federal Constitution abolishing slavery forever within the jurisdiction of the United States, and practically excludes them from the Union. If this assumption of the bill is correct, their concurrence can not be considered as having been legally given, and the important fact is made to appear that the consent of three-fourths of the States—the requisite number—has not been constitutionally obtained to the ratification of that amendment, thus leaving the question of slavery where it stood before the amendment was officially declared to have become a part of the Constitution.

That the measure proposed by this bill does violate the Constitution in the particulars mentioned and in many other ways which I forbear to enumerate is too clear to admit of the least doubt. *Messages and Papers of the Presidents, Vol. VI, p. 508.*

When I contemplate the millions of our fellow citizens of the South with no alternative left but to impose upon themselves this fearful and untried experiment of complete negro enfranchisement—and white disfranchisement, it may be, almost as complete—or submit indefinitely to the rigor of martial law, without a single attribute of freemen, deprived of all sacred guaranties of our Federal Constitution, and threatened with even worse wrongs, if any worse are possible, it seems to me their condition is the most deplorable to which any people can be reduced. *Messages and Papers of the Presidents, Vol. VI, p. 534.*

Thus over all these ten States this military government is now declared to have unlimited authority. It is no longer confined to the preservation of the public peace, the administration of criminal law, the registration of voters, and the superintendent of elections, but “in all respects” is asserted to be paramount to the existing civil governments.

It is impossible to conceive any state of society more intolerable than this; and yet it is to this condition that 12,000,000 American citizens are reduced by the Congress of the United States. Over every foot of the immense territory occupied by these American citizens the Constitution of the United States is theoretically in full operation. It binds all the people there and should protect them; yet they are denied every one of its sacred guaranties.

Of what avail will it be to any one of these Southern people when seized by a file of soldiers to ask for the cause of arrest or for the production of the warrant? Of what avail to ask for the privilege of bail when in military custody, which knows no such thing as bail? Of what avail to demand a trial by jury, process for witnesses, a copy of the indictment, the privilege of counsel, or that greater privilege, the writ of *habeas corpus*? *Messages and Papers of the Presidents, Vol. VI, p. 537.*

A power that hitherto all the departments of the Federal Government, acting in concert or separately, have not dared to exercise is here attempted to be conferred on a subordinate military officer. To him, as

a military officer of the Federal Government, is given the power, supported by "a sufficient military force," to remove every civil officer of the State. What next? The district commander, who has thus displaced the civil officer, is authorized to fill the vacancy by the detail of an officer or soldier of the Army, or by appointment of "some other person."

This military appointee, whether an officer, a soldier, or "some other person," is to perform "the duties of such officer or person so suspended or removed." In other words, an officer or soldier of the Army is thus transformed into a civil officer. He may be made a governor, a legislator, or a judge. However unfit he may deem himself for such civil duties, he must obey the order. The officer of the Army must, if "detailed," go upon the supreme bench of the State with the same prompt obedience as if he were detailed to go upon a court-martial. The soldier, if detailed to act as a justice of the peace, must obey as quickly as if he were detailed for picket duty. *Messages and Papers of the Presidents, Vol. VI, p. 538.*

A singular contradiction is apparent here. Congress declares these local State governments to be illegal governments, and then provides that these illegal governments shall be carried on by Federal officers, who are to perform the very duties imposed on its own officers by this illegal authority of the State. It certainly would be a novel spectacle if Congress should attempt to carry on a *legal* State government by the agency of its own officers. It is yet more strange that Congress attempts to sustain and carry on an illegal State government by the same Federal agency. *Messages and Papers of the Presidents, Vol. VI, p. 539.*

This bill and the acts to which it is supplementary are all founded upon the assumption that these ten communities are not States and that their existing governments are not legal. Throughout the legislation upon this subject they are called "rebel States," and in this particular bill they are denominated "so-called States," and the vice of illegality is declared to pervade all of them. The obligations of consistency bind a legislative body as well as the individuals who compose it. It is now too late to say that these ten political communities are not States of this Union. Declarations to the contrary made in these three acts are contradicted again and again by repeated acts of legislation enacted by Congress from the year 1861 to the year 1867.

During that period, while these States were in actual rebellion, and after that rebellion was brought to a close, they have been again and again recognized as States of the Union. Representation had been apportioned to them as States. They have been divided into judicial districts for the holding of district and circuit courts of the United States, as States of the Union only can be districted. The last act on this subject was passed July 23, 1866, by which every one of these ten States was arranged into districts and circuits.

They have been called upon by Congress to act through their legislatures upon at least two amendments to the Constitution of the United States. As States they have ratified one amendment, which required the vote of twenty-seven States of the thirty-six then composing the Union. *Messages and Papers of the Presidents, Vol. VI, p. 540.*



It is clear to my apprehension that the States lately in rebellion are still members of the National Union. When did they cease to be so? The "ordinances of secession" adopted by a portion (in most of them a very small portion) of their citizens were mere nullities. If we admit now that they were valid and effectual for the purpose intended by their authors, we sweep from under our feet the whole ground upon which we justified the war. Were those States afterwards expelled from the Union by the war? The direct contrary was averred by this Government to be its purpose, and so understood by all those who gave their blood and treasure to aid in its prosecution. It can not be that a successful war, waged for the preservation of the Union, had the legal effect of dissolving it. The victory of a nation's arms was not the disgrace of her policy; the defeat of secession on the battlefield was not the triumph of its lawless principle. Nor could Congress, with or without the consent of the Executive, do anything which would have the effect, directly or indirectly, of separating the States from each other. To dissolve the Union is to repeal the Constitution which holds it together, and that is a power which does not belong to any part of this Government, or to all of them united.

This is so plain that it has been acknowledged by all branches of the Federal Government. The Executive (my predecessor as well as myself) and the heads of all the Departments have uniformly acted upon the principle that the Union is not only undissolved, but indissoluble. *Messages and Papers of the Presidents, Vol. VI, p. 560.*

To demonstrate the unconstitutional character of those acts I need do no more than refer to general provisions. It must be seen at once that they are not authorized. To dictate what alterations shall be made in the constitutions of the several States; to control the elections of State legislators and State officers, members of Congress and electors of President and Vice-President, by arbitrarily declaring who shall vote and who shall be excluded from that privilege; to dissolve State legislatures or prevent them from assembling; to dismiss judges and other civil functionaries of the State and appoint others without regard to State law; to organize and operate all the political machinery of the States; to regulate the whole administration of their domestic and local affairs according to the mere will of strange and irresponsible agents, sent among them for that purpose—these are powers not granted to the Federal Government or to any one of its branches. Not being granted, we violate our trust by assuming them as palpably as we would by acting in the face of a positive interdict; for the Constitution forbids us to do whatever it does not affirmatively authorize, either by express words or by clear implication. If the authority we desire to use does not come to us through the Constitution, we can exercise it only by usurpation, and usurpation is the most dangerous of political crimes. It leads directly and immediately to the establishment of absolute rule, for undelegated power is always unlimited and unrestrained.

The acts of Congress in question are only objectionable for their assumption of ungranted power, but many of their provisions are in conflict with the direct prohibitions of the Constitution. *Messages and Papers of the Presidents, Vol. VI, p. 562.*

Yet the system of measures established by these acts of Congress does not totally subvert and destroy the form as well as the substance

of republican government in the ten States to which they apply. It binds them hand and foot in absolute slavery, and subjects them to a strange hostile power, more unlimited and more likely to be abused than any other now known among civilized men. It tramples down all those rights in which the essence of liberty consists, and which a free government is always most careful to protect. It denies the *habeas corpus* and the trial by jury. Personal freedom, property and life, if assailed by the passion, the prejudice, or the rapacity of the ruler, have no security whatever. It has the effect of a bill of attainder or bill of pains and penalties, not upon a few individuals, but upon the whole masses, including the millions who inhabit the subject States, and even their unborn children. These wrongs, being expressly forbidden, can not be constitutionally inflicted upon any portion of our people, no matter how they may have come within our jurisdiction, and no matter whether they live in States, Territories, or districts. *Messages and Papers of the Presidents, Vol. VI, p. 563.*

It is manifestly and avowedly the object of these laws to confer upon negroes the privilege of voting and to disfranchise such a number of white citizens as will give the former a clear majority at all elections in the Southern States. This, to the minds of some persons, is so important that a violation of the Constitution is justified as a means of bringing it about. The morality is always false which excuses a wrong because it proposes to accomplish a desirable end. We are not permitted to do evil that good may come. But in this case the end itself is evil, as well as the means. The subjugation of the States to negro domination would be worse than the military despotism under which they are now suffering. It is believed beforehand that the people would endure any amount of military oppression for any length of time rather than degrade themselves by the subjection of the negro race. Therefore they have been left without a choice. Negro suffrage was established by act of Congress, and the military officers were commanded to superintend the process of clothing the negro race with the political privileges torn from white men. *Messages and Papers of the Presidents, Vol. VI, p. 564.*

The great difference between the two races in physical, mental, and moral characteristics will prevent an amalgamation or fusion of them together in one homogeneous mass. If the inferior obtains the ascendancy over the other, it will govern with reference only to its own interests—for it will recognize no common interest—and create such a tyranny as this continent has never witnessed. Already the negroes are influenced by promises of confiscation and plunder. They are taught to regard as an enemy every white man who has any respect for the rights of his own race. If this continues, it must become worse and worse, until all order will be subverted, all industry cease, and all fertile fields of the South grow up in wilderness. Of all the dangers which our nation has yet encountered, none are equal to those which must result from the success of the effort now making to Africanize the half of our country. *Messages and Papers of the Presidents, Vol. VI, p. 566.*

The foregoing severe indictments of these tyrannical edicts, because they were not and probably were not intended to be,

Constitutional statutes or acts of Congress, led Congress to institute impeachment proceedings against the President. Of course the information contained other grounds and specifications of impeachable conduct, but it was the free and frequent exercise of the veto power as to the many vicious acts which Congress was passing which were intended to inflict "undue and cruel punishment" upon the people of the South, which chiefly induced Congress to attempt to remove the President from office. Prejudice, passion and sectional feelings were so strong that this impeachment failed by only one vote.

Mr. Foster, a Northern and Constitutional writer, thus speaks of the Reconstruction Acts:

In view of the language of the Constitution, the decisions of the courts on cognate questions, and the action of Congress in other respects towards the States which were the seat of the insurrection, it seems impossible to find any justification for them in law, precedent, or consistency. The war was instituted against the South upon the theory announced by the President and both houses of Congress, who had rebelled. *Foster on the Constitution, Vol. I, p. 265.*

The Reconstruction Acts must consequently be condemned as unconstitutional, founded on force, not law, and so tyrannical as to imperil the liberty of the entire nation should they be recognized as binding precedents. *Foster on the Constitution, Vol. I, p. 267.*

If those cruel acts had been upheld as Constitutional enactments, the government of the United States could have been classed as the most cruel in the world's history. It is inconceivable that if Nero had been president that he could have approved such tyrannical edicts.

In referring to the history of the reconstruction measures of Congress, we may also mention the attempt in the name of the State of Mississippi to enjoin the President from enforcing those measures on the ground of unconstitutionality. The attempt failed; the Supreme Court of the United States holding that it was not in the power of the judiciary to coerce or restrain the President in the performance of his executive and political functions. *Mississippi v. Johnson, 4 Wall. 475.* The case was distinguished from *Marbury v. Madison, 1 Cranch, 137,* and *Kendall v. Stockton, 12 Pet. 527,* in which cases the acts to be performed were purely ministerial, and nothing was left to the discretion of the officer. See also *Georgia v. Stanton, 6 Wall. 51.* *Story on the Constitution, Vol. V, p. 680, (note).*

Mr. Foster thus states the difficulties and oppressions caused by Reconstruction.

The restoration of peace and order after the close of the Civil War, and the readmission of the conquered people to their former relations with the Federal government, presented the most difficult political and constitutional problem, which the United States has had to solve.

It was accomplished only by what was, in fact as well as name, a complete reconstruction of the Union. The result had established the illegality of secession, and the proceedings by the successful army had been justified upon the position that the war was made, not upon the seceding States, which could not be, and had not been, in law or fact separated from the Union, but upon such of the people in them as had combined to oppose the laws of the United States. *Foster on the Constitution, Vol. I, p. 205.*

The situation was further complicated by the clause in the Constitution which would, if unamended, give to the Southern whites representation in the House of Representatives, based upon the whole number of free inhabitants, although by the State laws then upon their statute-books, the blacks, who were, in Mississippi, Louisiana and South Carolina, more than half the population, could not vote, so that, if the result of the war left that unchanged, the conquered section would have gained a stronger voice in the national councils than before. *Foster on the Constitution, Vol. I, p. 207.*

The theory of forfeited rights was that upon which Congress finally acted. It was a compromise between the other views, and had little support in the logical interpretation of the Constitution, although great practical advantages. According to this, the insurgent States had never left, could not go out of the Union, and had always retained their political existence, but by their rebellion they had forfeited their political right to share in the councils of the nation and even to complete local governments. *Foster on the Constitution, Vol. I, p. 209.*

Both houses of Congress, through their power to determine the qualifications of their members, excluded all persons who, in their opinion, were guilty of disloyalty. Several senators from the Confederate States, and one from the loyal State of Kentucky, were expelled for treason. The validity of this action by the House and Senate is beyond dispute. The law prescribing a test-oath for grand jurors remained upon the statute book until May 14th, 1884, when it was repealed, after the clear intimation by the Supreme Court that although it might be a constitutional exercise of the war-power, it was unconstitutional in time of peace. *Foster on the Constitution, Vol. I, pp. 211-212.*

The shot which killed Lincoln was more injurious to the South than any other fired in the Civil War. It was his earnest desire to restore the insurgent States to their normal condition as soon as possible, without any more change than was absolutely necessary in the fundamental law. That the validity of the Proclamation of Emancipation should be recognized he was determined; but, beyond that, he was not disposed to impose further material conditions upon their return, although there can be little doubt but that he would have found some means of protecting the freedmen from oppression. *Foster on the Constitution, Vol. I, p. 214.*

Mr. Davis thus describes the condition of the Confederate States and their people after the surrender:

When the Confederate soldiers laid down their arms and went home, all hostilities against the power of the Government of the United States ceased. The powers delegated in the compact of 1787 by these States,



i. e., by the people thereof, to a central organization to promote their general welfare, had been used for their devastation and subjugation. It was conceded, as the result of the contest, that the United States Government was stronger in resources than the Confederate Government, and that the Confederate States had not achieved their independence.

Nothing remained to be done but for the sovereigns, the people of each State, to assert their authority and restore order. If the principle of the sovereignty of the people, the cornerstone of all our institutions, had survived and was still in force, it was necessary only that the people of each State should reconsider their ordinances of secession, and again recognize the Constitution of the United States as the supreme law of the land. The simple process would have placed the Union on its original basis, and have restored that which had ceased to exist, the Union by consent. Unfortunately, such was not the intention of the conqueror. The Union of free-wills and brotherly hearts, under a compact ordained by the people, was not his object. Henceforth there was to be established a Union of force. Sovereignty was to pass from the people to the Government of the United States, and to be upheld by those who had furnished the money and the soldiers for the war.

The first step required, therefore, in the process for the reconstruction of the new and forced Union, was to prepare those who had been the late champions of the sovereignty of the people to become suitable subjects under the new sovereign. Standing defenseless, stripped of their property, and exposed, as it was asserted, to the penalties of insurrection on the one hand, and that of treason on the other, the President of the United States, Mr. Andrew Johnson, who, as Vice-President, became President after the death of Mr. Lincoln, on May 29, 1865, thus addressed them:

"To the end, therefore, that the authority of the Government of the United States may be restored, and that peace, order, and freedom may be re-established, I, Andrew Johnson, President of the United States, do proclaim and declare that I hereby grant to all persons who have directly or indirectly participated in the existing rebellion, except as hereinafter excepted, amnesty and pardon, with restoration of all rights of property, except as to slaves, and except in cases where legal proceedings under the laws of the United States providing for the confiscation of property of persons engaged in the rebellion have been instituted; but on the condition, nevertheless, that every such person shall take and subscribe the following oath or affirmation, and thenceforward keep and maintain said oath inviolate; and which oath shall be registered for permanent preservation, and shall be of tenor and effect following, to wit:

"I....., do solemnly swear, or affirm, in presence of Almighty God, that I will henceforth faithfully support and defend the Constitution of the United States and the Union thereunder, and that I will, in like manner, abide by and faithfully support all laws and proclamations which have been made during the existing rebellion with reference to the emancipation of slaves, so help me, God."

The permission to take this oath was withheld from large classes of citizens. It will be seen that there are two stipulations in this oath, the first faithfully to support the Constitution of the United

States and the Union thereunder. This comprises obedience to the laws made in conformity to the Constitution, and is all that is requisite in the simple oath of allegiance of an American citizen. The second stipulation is:

"To abide by and faithfully support all laws and proclamations which have been made during the existing rebellion with reference to the emancipation of slaves."

What need was there of this second stipulation? Because the laws were not enacted, nor the proclamation issued under any grant of power in the Constitution or under its authority. Now, the exercise of a power by a Government, for which it has no constitutional authority, is not only a usurpation, but it destroys the sanction of all written instruments of government. Also, what has become of the unalienable right of property, which all the State governments were created to protect and preserve? Where was the sovereignty of the people under these proceedings? Yet the Confederate citizen was required to bind himself by an oath to abide by and faithfully support all these usurpations; the alternatives being to resist the Government, or to aid and abet a violation of the Constitution.

Meanwhile, each of the late Confederate States was occupied by a military force of the Government of the United States, and military orders were the supreme law; and that Government thereby proceeded to establish a State organization based on the principle of its own sovereignty. *Davis on The Rise and Fall of The Confederate Government, Vol. II, 718-19-20.*

In 1865 the Congress of the United States passed an act which provided that the following amendment to the Constitution should be submitted to the Legislatures of the several States for ratification:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to its jurisdiction.

"Section 2. Congress shall have full power to enforce this article by appropriate legislation."

One Dr. James L. Watson was tried for killing a negro in Rock-bridge County, Va., and acquitted. Major-General Schofield, in command of the military forces of the department, immediately ordered his arrest and trial by the military commission. On the assembling of the commission a writ of habeas corpus was sued out of the Circuit Court of Richmond in behalf of Watson, and served on the General. In his answer, he declined compliance with the writ, stating:

"Dr. Watson is held for trial by military commission, under the authority of the act of Congress of July 16, 1866, which act directs and requires the President, through the commissioner and officers of the Freedmen's Bureau, to exercise military jurisdiction over all cases and questions concerning the free enjoyment of the right to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, etc., by all citizens, without respect to race or color, or previous condition of slavery, of the States whose constitutional relations to the Government of the United States have been discontinued by the rebellion, and have not been restored."

In the meantime, the United States Attorney-General having examined the case, and reported that, in his opinion, the military commission had not competent jurisdiction, the President thereupon directed that the commission be dissolved and the prisoner discharged without delay. *Davis on The Rise and Fall of The Confederate Government, Vol. II, 725-6.*

A storm was now brewing which was soon to involve the President and Congress in open conflict. The reader will remember that, during the period in which these proceedings took place in Virginia, similar ones occurred in all the remaining Confederate States. Not only in Virginia, but in several of the other States, some persons had been voted for as members of Congress, but in no case had they been admitted to seats. This was one of the measures taken by Congress to indicate its disapproval of the President's plan for the treatment of the late Confederate States.

The difficulties that now arose between the President and Congress had reference entirely to the affairs of the Confederate States. The plan of the President left the negroes to the care of the States alone after the establishment of their emancipation. Congress desired them to be made American citizens, secure for them all the rights of freemen and voters. The refusal to admit Senators and Representatives from the Confederate States served to arrest the operation of the President's plans to hold these States in abeyance.

No compromise could be made between the two. Each appealed to the Constitution, forgetful that each had sustained all its ruthless violations during the last four years. Congress, therefore, commenced an independent action, and in its reckless course sought, unsuccessfully, to rid itself of the President by impeachment. Its first act, at the commencement of the session, in December, 1865, was the appointment, by a large majority, in each House, of a joint Committee of Fifteen, to which was referred all questions relating to the conditions and manner in which Congress would recognize the late Confederate States as members of the Union. Meantime the credentials of all persons sent as Representatives and Senators from them were laid upon the table in each House, there to remain until the final action of the Committee of Fifteen. This was followed by the passage, in February, 1866, of "an act to establish a bureau for the relief of freemen, refugees, and abandoned lands." It proposed to establish military jurisdiction over all parts of the United States containing refugees and freedmen. This bill was vetoed by the President and passed over his veto. *Davis on The Rise and Fall of The Confederate Government, Vol. II, 726-7.*

On June 8, 1866, a majority and a minority report were made by the Committee of Fifteen. Meanwhile, a report had been made from the same committee, at a previous date, in the form of an amendment to the Constitution, which was debated and amended in each House, and finally passed by the requisite majority in each. Thus was to be secured the political support and votes of the negroes, who were expected to be the controlling citizens of the late Confederate States.

The fourteenth amendment to the Constitution was now submitted

to the Legislatures of all the States, to be valid as a part of the Constitution, when ratified by three fourths. *Davis on The Rise and Fall of The Confederate Government, Vol. II, 727-8.*

It may here be stated that the restoration of the late Confederate States to all the rights and privileges of States as coequal members of the Union, under the plan of President Johnson, received the approval of the executive and judicial branches of the Government soon after the cessation of hostilities. Congress, however, not only withheld its assent, but, during its session in 1866, required as a condition precedent to a recognition of any one of these States, and the admission of its Representatives and Senators to seats, the adoption by its Legislature of the above-mentioned amendment. The question really involved in this amendment was the admission to citizenship and the ballot of the negroes in these States. It was the acknowledged fact that the authority to determine this question resided in the States severally and nowhere else. The amendment itself, in its second section, recognized the authority to grant or withhold the elective franchise as existing in the State governments.

This amendment was submitted to the Legislatures of the States immediately after its adoption by Congress in June, 1866, and by March 30, 1867, it had been ratified by twenty States, including West Virginia, Maryland, Missouri and Tennessee, and rejected by thirteen, including Delaware and Kentucky, and eleven of the late Confederate States. There were thirty-four States at that time, and thirty had voted. A ratification by three-fourths was required to make it valid.

When this amendment was presented for ratification to the Legislature of Virginia at its session commencing December, 1866, it was rejected in the Senate by a unanimous vote, and in the House by a vote of seventy-four to one. Meanwhile the Freedmen's Bureau was organized and put in operation in the State, but the military occupation continued, and the condition of affairs remained unchanged during the proceedings of Congress to construct its plan for subjugation.

After the vote of the State up to March, 1867, it was manifest that no real advance had been made in the extension of the franchise to the negro population of the States. In this position of affairs Congress, on March 2d, adopted an entirely new system of measures relative to the late Confederate States. The fiction upon which these measures were based is thus expressed in the preamble of the first act:

"Whereas, no legal State governments, or adequate protection for life or property, now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Louisiana, Florida, Texas and Arkansas; and, *whereas*, it is necessary that peace and good order should be enforced in said States, until loyal republican State governments can be legally established: therefore, be it *enacted*," etc.

These States were then divided into five military districts, and it was further provided:

Until the people of the said rebel States shall by law be admitted to representation to the Congress of the United States, all civil governments that may exist therein shall be deemed provisional only, and shall be in all respects subject to the paramount authority of the United States, at any time to abolish, modify, control, and supersede the same, and in all elections to any office under such provisional gov-



ernments, all persons shall be entitled to vote under the provisions of the fifth section of this act." *Davis on The Rise and Fall of The Confederate Government, Vol. II, 730.*

The President vetoed the bill, and in his message said:

"Thus, over all these ten States, this military government is now declared to have unlimited authority. It is no longer confined to the preservation of the public peace, the administration of criminal law, the registration of voters, and the superintendence of elections; but, 'in all respects,' is asserted to be paramount to the existing civil governments. It is impossible to conceive any state of society more intolerable than this, and yet it is to this condition that twelve millions of American citizens are reduced by the Congress of the United States. Over every foot of the immense territory occupied by these American citizens, the Constitution of the United States is theoretically in full operation. It binds all the people there, and should protect them; yet they are denied every one of its sacred guarantees. Of what avail will it be to any one of these Southern people, when seized by a file of soldiers, to ask for the cause of the arrest, or for the production of the warrant? Of what avail to ask for the privilege of bail when in military custody, which knows no such thing as bail? Of what avail to demand a trial by jury process, for witnesses, a copy of the indictment, the privilege of counsel, or that greater privilege, the writ of *habeas corpus*?" *Davis on The Rise and Fall of The Confederate Government, Vol. II, 732-3.*

Reconstruction conventions were assembled under military authority in Virginia:

The Convention assembled on December 3d and adjourned on April 17, 1868. The Bill of Rights adopted declared that—

"The State shall ever remain a member of the United States of America, and the people thereof a part of the American nation, and all attempts, from whatever source, and upon whatever pretext, to dissolve the Union, or to sever said Union, are unauthorized, and ought to be resisted with the whole power of the States.

"The Constitution of the United States, and the laws of Congress passed in pursuance thereof, constitute the supreme law of the land, to which paramount allegiance and obedience are due from every citizen, anything in the Constitution, ordinances, or laws of any States to the contrary notwithstanding."

Suffrage was granted to every male citizen twenty-one years of age. All officers of the State were required to take the following oath:

"I....., do solemnly swear that I will support and maintain the Constitution of the United States and the Constitution and laws of the State of Virginia; and that I recognize and accept the civil and political equality of all men before the law," etc.

In addition, all State, city and county officers were required to take the test-oath prescribed by Congress on July 2, 1862, as follows:

"I do solemnly swear that I have never borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have never sought or accepted, nor attempted to exercise the functions of any office whatever, under any authority, or pretended authority, in hostility to the United

States; that I have not yielded a voluntary support to any pretended government, authority, power, or Constitution within the United States, hostile or inimical thereto; and I do further swear that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter."

Major-General Schofield, in an address to the Convention in opposition to these stringent provisions, said:

"You can not find in some of the counties a sufficient number of men who are capable of filling the offices, and who can take the oath you have prescribed here; I have no hesitation in saying that I believe it impossible to inaugurate a government upon that basis."

Meantime the so-called Constitution was adopted by the Convention, and June 2d fixed for the popular vote upon it. But no appropriation was made for the expenses of the election, and it was not held. *Davis on The Rise and Fall of The Confederate Government, Vol. II, 734-5-6.*

The fifteenth article of amendment to the Constitution was passed by Congress in February, 1869, and submitted to the Legislatures of the States. It was as follows:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

On the passage of the amendment by the United States Senate, Senator Garrett Davis, of Kentucky, said:

"Sir, your amendments to the Constitution are all void; they are of no effect. They were proposed by a mutilated Congress; they were proposed by a mutilated House of Representatives and Senate." *Davis on The Rise and Fall of The Confederate Government, Vol. II, 736.*

The election in Virginia took place on July 6, 1869. The vote on the Constitution was, for it, 206,233; against it, 9,189. For the disfranchising clause, 84,404; against it, 124,361. In favor of the test-oath clause, the votes were, 83,114; against it, 124,106. State officers and a Legislature were chosen.

Meantime the civil or provisional Governor had been removed by the military commander, Major-General Stoneman, and the commander of the first district put in the vacancy. At the same time the President-Judge of the Supreme Court of Appeals was a staff-officer of the General commanding, and assigned to duty; and another one of the judges of that court was an officer of the Federal army, receiving his appointment from the same source.

On October 5th the Legislature assembled, the State officers-elect having already entered upon their duties. The fourteenth and fifteenth amendments to the United States Constitution were adopted, and Senators elected to Congress. On January 26, 1870, a bill for the admission of the State into the Union, "without further condition," was passed.

Her subjection was now completed. The military commanders were withdrawn and she was left in the hands of "carpet-baggers." *Davis on The Rise and Fall of The Confederate Government, Vol. II, 737.*

The State officers for North Carolina elected under the plan of President Johnson had continued in the peaceful administration of their duties. Therefore, on the day of the inauguration of the newly-elected Governor (Holden), the existing Governor (Worth) made a spirited protest, saying:

"I do not recognize the validity of the late election, under which you and these co-operating with you claim to be invested with the civil government of the State. You have no evidence of your election, save the certificate of a major-general of the United States Army, I regard all of you as, in effect, appointees of the military power of the United States, and not as deriving your powers from the consent of those you claim to govern. Knowing, however, that you are backed by military force here, which I could not resist if I would, I do not deem it necessary to offer a futile opposition, but vacate the office without the ceremony of actual eviction, offer no further opposition than this, my protest." *Davis on The Rise and Fall of The Confederate Government, Vol. II 839-40.*

In South Carolina, proceedings were commenced on June 20, 1865, when President Johnson issued a proclamation similar to the one in the case of Virginia, and appointed Benjamin F. Perry as provisional Governor of the State. He continued all persons in office on taking the amnesty oath, and all laws in force prior to the secession of the State were maintained except those conflicting with the proclamation; delegates to a so-called State Convention were elected on the first Monday of September, and the Convention assembled on the 13th to amend the State Constitution. The ordinance of secession was repealed and slavery abolished. Blacks were made witnesses in all cases where the rights or property of persons of that class were involved. An election of State officers and a so-called Legislature were held. The latter convened on October 25th. The thirteenth amendment to the Constitution of the United States prohibiting slavery was ratified. On November 29th the provisional Governor retired, and the so-called Governor-elect (Orr) was inaugurated. The work of the Legislature was very complete. *Davis on The Rise and Fall of The Confederate Government, Vol. II, 740-1.*

In Georgia, on the cessation of hostilities, the Governor issued a proclamation calling a session of the Legislature. But the commanding General issued an order declaring the proclamation to be null and void. Another military officer, in a letter to the Governor, stated that he was instructed by the President to say to him, that "the persons who incited the war and carried it on will not be allowed to assemble at the call of their accomplice to act again as the Legislature of the State, and again usurp the authority and franchises. In calling the Legislature together again, without the permission of the President, you have perpetrated a fresh crime; and, if any person presumes to answer or acknowledge your call, he will be immediately arrested." The military authorities of the United States then took the control of affairs until the appointment of James Johnson, on June 17th, by the

President, as provisional Governor of the State, by a proclamation similar to the one issued in the case of Virginia. On July 13th he issued a proclamation prescribing the regulations for a State Convention. Provost-marshals had been stationed all over the State to regulate local affairs, and the laws in force previous to 1861 were ordered to be enforced. Delegates were elected on October 4th, and the so-called State Convention assembled on October 25th. The ordinance of secession was repealed. The payment of the war debt was prohibited. The emancipation of the slaves were expressly recognized, and a so-called election for State officers, members of the Legislature and of Congress, was appointed to be held on November 15th. The Legislature assembled on December 4th, and unanimously adopted the thirteenth amendment to the Federal Constitution, prohibiting the existence of slavery. Charles J. Jenkins, Governor-elect, was inaugurated, and on December 19, 1865, the provisional Governor relinquished the conduct of the State affairs to the constituted authorities. The Freedmen's Bureau Act and the Civil Rights Act of Congress were enforced by the military authorities. *Davis on The Rise and Fall of The Confederate Government, Vol. II, 745-6.*

The so-called election on the Constitution, and for State officers, and Legislature, and members of Congress, was held on April 20th and following days: The State Constitution was declared to be ratified; Rufus W. Bullock, the so-called Republican candidate, was declared to be elected Governor by a majority of seven thousand votes. The Legislature assembled on July 4, 1868, with three Senators and twenty-five Representatives who were negroes. The fourteenth amendment to the Federal Constitution was adopted, and all the condition of Congress were fulfilled; and on July 28, 1868, she was declared to be restored to the Union. Subsequently it appeared that the State Convention had made no provision which could be construed as expressly giving the black man a right to hold office, and all these members expelled from the Legislature. The matter was taken up by Congress, and the State was not fully recognized as in the Union until 1870. *Davis on The Rise and Fall of The Confederate Government, Vol. II, 748.*

In Alabama the proclamation of President Johnson was issued on June 21, 1865, by which Lewis E. Parsons was appointed provisional Governor and the usual proceedings prescribed. On July 20th the Governor issued a proclamation, which renewed the powers of the persons holding the township offices in the State; called a State Constitutional Convention to assemble on September 10th, and reordained the civil and criminal laws, except those relating to slaves, as they existed previous to 1861, and prescribed other regulations. A peaceful election was held, and the delegates to the so-called Convention assembled and took an oath to support the Constitution of the United States and the Union thereof, and all proclamations relative to the emancipation of slaves. Slavery was prohibited, the war debt declared void, and the secession ordinance repealed. An election for State officers, members of the Legislature, and Representatives in Congress, was ordered on the first Monday of November. The new Constitution was not submitted to a vote of the people on account of the delay it would occasion. Robert M. Patton was elected Governor, and the Legislature assembled



on November 20th. The amendment to the Constitution of the United States prohibiting the existence of slavery was ratified, and on December 18, 1865, the provisional Governor surrendered the conduct of the affairs of the State to the Governor-elect.

During the existence of the Confederate Government, the Protestant Episcopal Church South was established, and the prayer for the President of the United States and all in civil authority, in the "Book of Common Prayer," was changed to one for the Confederate authorities. Upon the restoration of the authority of the United States, the prayer for the President was omitted altogether, by the recommendation of Bishop Wilmer; whereupon Major-General Woods issued an order by which the Bishop and all his clergy in the diocese of Alabama "were suspended from their functions and forbidden to preach or perform divine service." The order was subsequently set aside by President Johnson. *Davis on The Rise and Fall of The Confederate Government, Vol. II, 750.*

Mississippi, immediately after the cessation of hostilities, was occupied by a military force of the United States. Meantime, the Governor called an extra session of the Legislature, and made provision for a Constitutional Convention; but these measures were set aside by the proclamation of President Johnson, on June 13th, appointing William L. Sharkey provisional Governor. The system of measures embraced in the plan of the President for the restoration of the Confederate States to the Union was immediately commenced and completed in the election of Benjamin G. Humphreys for Governor, with the other State officers, members of the Legislature, and Representatives in Congress.

The fourteenth amendment of the Constitution was unanimously rejected by the Legislature in January, 1867.

Under the act of Congress of March 2, 1867, Major-General Ord assumed command of the Fourth Military Division, consisting of Mississippi and Arkansas. Governor Humphreys sought immediately to bring the question of the constitutionality of this act before the United States Supreme Court. Arguments were heard upon it by the Court. The motion was to enjoin and restrain President Johnson and Major-General Ord from executing the act and supplements. It was denied, and Chief-Justice Chase, on delivering the opinion, said:

"If the President refuses obedience, it is needless to observe that the Court is without power to enforce its process. If, on the other hand, the President complies with the order of the Court, and refuses to execute the act of Congress, is it not clear that a collision may occur between the executive and legislative departments of the Government? May not the House of Representatives impeach the President for such refusal?"

Major-General Ord, immediately after assuming command, proceeded to organize boards for the registration of voters and prescribe their qualifications and disqualifications. The latter were so numerous as to embrace, in all these States, every white who had voluntarily done the most simple act to aid or favor any person engaged in the Confederate service, or had incited, by words, others to render such aid, while the entire class of blacks were not disqualified by such acts,

as it was assumed that they were done by compulsion. Thus the aim and end of registration, after this manner, in a State, were to throw the entire political power into the hands of the negroes.

Orders were now issued directing the military to co-operate with the civil officers to break up the crime of horse-stealing, to secure to labor its share of the crops, and to protect debtor and creditor from sacrifices by forced sales; to suspend for a time certain sales under execution; to prohibit interference with the legal tenant; to ascertain if distillers had paid their taxes; to investigate complaints made by citizens of persecution by civil authorities; to notify State and municipal officers of the laws of Congress for the organization of their governments on the basis of suffrage without regard to color; to subordinate the Freedmen's Bureau to investigate all charges against landholders; to require supervisors, inspectors, and boards of registration to obtain the names of suitable persons, white or black, to act as clerks and judges of elections; to close strictly all bar-rooms and saloons for the day when political meetings were held; to remove the city marshal, three justices of the peace, and four members of the City Council of Vicksburg; to appoint other persons to fill vacancies, who were required to take the test oath of Congress; to forbid the assembling of bodies of citizens under any pretense; to transfer the papers to a military commission whenever a person who had been in the Federal service was indicted and apprehended an unfair trial; to notify overseers of the poor that any neglect to provide for colored paupers would be regarded as a neglect of duty, etc. *Davis on The Rise and Fall of The Confederate Government, Vol. II, 752-3-4.*

The power usurped by Congress was without a limitation, and extended to all the political, civil, and social relations. Many of the military commanders seem to have regarded their authority as equally comprehensive. The Attorney-General of the United States, in his official opinion on these acts of Congress, addressed to the President, on June 12, 1867, says:

"It appears that some of the military commanders have understood this grant of power as all-comprehensive, conferring on them the power to remove the executive and judicial officers of the State, and to appoint other officers in their places; to suspend the legislative power of the State; to take under their control, by officers appointed by themselves, the collection and disbursement of the revenues of the State; to prohibit the execution of the laws of the State by the agency of its appointed officers and agents; to change the existing laws in matters affecting purely civil and private rights; to suspend or enjoin the execution of the judgments and decrees of the established State courts; to interfere in the ordinary administration of justice in the State courts, by prescribing new qualifications for jurors; and to change, upon the ground of expediency, the existing relations of the parties to contracts, giving protection to one party by violating the rights of the other party." *Davis on The Rise and Fall of The Confederate Government, Vol. II, 758.*

In Louisiana, on January 4, 1875, a body of troops of the Government of the United States, on the order of Governor W. P. Kellogg, marched into the hall of the House of Representatives of the State Legislature, while that body was in session, and forcibly seized and

took out five members as not entitled to seats. The General in command (De Trobriand) then proceeded to eject the Clerk, and arrested the proceedings of the House. When expostulated with by the Speaker, he replied: "I am but a soldier. These are my orders." The members then retired.

In Mississippi, on December 7, 1874, a serious conflict occurred in Vicksburg between whites and blacks, which resulted in great loss of life and caused a widely-spread alarm. It grew out of frauds committed by public officers.

Again, during the exciting contest in Arkansas, the Congress of the United States appointed a committee to investigate the affairs in that State, and "whether said State had now a government republican in form, the officers of which are duly elected, and, as now organized, ought to be recognized by the Government of the United States."

On December 24, 1874, the Congress of the United States appointed a committee to proceed to New Orleans, and investigate the state of affairs in Louisiana. This committee reported on January 14, 1875, that "they could not agree upon any recommendation; but, upon the situation in Louisiana, as it appeared before us, we are all agreed." *Davis on The Rise and Fall of The Confederate Government, Vol. II, 761.*

Inalienable rights are unknown to this war-begotten theory of the Constitution. The day has come in which mankind behold this Government founding its highest claims to greatness and glory upon deeds done in utter violation of those rights which belonged to its own citizens in every State, North and South. The palladium of the freeman, the Bills of Rights, the limitations of power, the written Constitutions, have all lost their sacred authority, and not a man or a State dare, single-handed, gainsay the will of the agency which, feeling power, has forgotten right. It has put its hands on the ballot-box, and the declaration is made that it is not safe to trust the people to vote, except under the inspection of its authority, after the example set by the Roman emperors. When the cause was lost, what cause was it? Not that of the South only, but the cause of constitutional government, of the supremacy of law, of the natural rights of man. *Davis on The Rise and Fall of The Confederate Government, Vol. II, 763.*

## STATE GOVERNMENT

### “What Constitutes a State?”

The great sentiment of Alcaeus, so beautifully presented to us by Sir William Jones, is absolutely indispensable to the construction and maintenance of our political systems:

“What constitutes a State?

Not high-raised battlement or labored mound,  
Thick wall or moated gate;

Not cities proud, with spires and turrets crowned;  
Not bays and broad-armed ports,

Where, laughing at the storm, rich navies ride;  
Not starred and spangled courts,

Where low-browed baseness wafts perfume to pride.  
No: Men, high-minded Men,

With powers as far above dull brutes endued,  
In forest, brake, or den,

As beasts excel cold rocks and brambles rude:  
Men who their duties know,

But know their rights, and, knowing, dare maintain;  
Prevent the long-aimed blow,

And crush the tyrant while they rend the chain:  
These constitute a state;

AND SOVEREIGN LAW, that state's collected will,  
O'er thrones and globes elate

Sits empress, crowning good, repressing ill.”

*2 Webster's Works, (7th ed.), p. 602.*

### “State” and “States” Defined

A State in the sense used in American Constitutions is one of the Commonwealths of the American Union or Federation of States. In some respects, states are not sovereign in the sense that they are nations with powers to deal with other nations. This power they granted to the Federal Government. They are sovereign however, in that they have their own Constitutions and own governments as to their own citizens and property therein, so far as all local and intra-state matters and questions are concerned. In fact, each possesses all the powers of government except those conferred on the Federal Government by the States or the people thereof, and those which the people who made the government, reserved for themselves, and their descendants and survivors. The people of the respective States first created the State, and then the States, or the people thereof, created the Federal Government. Both governments or the compound thereof was created by the people, and both together do not possess all governmental power, such as is possessed by absolute monarchies.



Judge Cooley, in the opening paragraph of his valuable work on Constitutional Limitations, thus defines "State":

A State is a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength. The terms *nation* and *State* are frequently employed, not only in the law of nations, but in common parlance, as importing the same thing; but the term *nation* is more strictly synonymous with *people*, and while a single State may embrace different nations of peoples, a single nation will sometimes be so divided politically as to constitute several States.

"In American constitutional law the word *State* is applied to the several members of the American Union, while the word *nation* is applied to the whole body of the people embraced within the jurisdiction of the Federal Government. *Cooley on Constitutional Limitations*, 1.

The term "States" as used in the Constitution is defined by the Supreme Court of the United States, in the case of *Texas v. White*, 7 Wall. 700.

Mr. Black thus describes the "States":

In American constitutional law the word "State" is generally employed to denote one of the component commonwealths of the American Union. These states, as will presently appear, are not sovereign. Neither are they nations, in any proper sense of the term. They are political communities, occupying separate territories, and possessing powers of self-government in respect to almost all matters of local interest and concern. Each, moreover, has its own constitution and laws and its own government, and enjoys a limited and qualified independence. *Black on Constitutional Laws*, 20.

The several states composing the American Union never enjoyed complete sovereignty as regards the external side, and do not now possess it. This is shown by the fact that they were always subject to some common superior in respect to their relations with foreign powers. First it was the king and parliament of England, then the revolutionary congress, then the confederation, and now the United States. For as all authority over foreign relations and affairs is confided to the national government, it follows as a necessary consequence that all such authority is denied to the separate states. None of them can deal directly with a foreign nation. "The only government of this country which other nations recognize or treat with is the government of the Union, and the only American flag known throughout the world is the flag of the United States." *Black on Constitutional Laws*, 22.

### Condition of States Prior to the Constitution

During their colonial condition, they formed distinct communities—each with its separate charter and government—and in no way connected with each other, except as dependent members of a common empire. Their first union amongst themselves was, in resistance to the encroachments of the parent country on their chartered rights—when

they adopted the title of, "the United Colonies." Under that name they acted, until they declared their independence; always, in their joint councils, voting and acting as separate and distinct communities; and not in the aggregate, as composing one community or nation. They acted in the same character in declaring independence; by which act they passed from their dependent, colonial condition, into that of free and sovereign States. *1 Calhoun's Works, pp. 123-124.*

### **Duty As to Usurpations of State Powers**

The following is taken from Madison's address to the Legislature of Virginia, and to the people of that State, in 1798:

It would be perfidious in those entrusted with the guardianship of the State sovereignty, and acting under the solemn obligation of the following oath, "I do swear that I will support the Constitution of the United States," not to warn you of encroachments, which, though clothed with the pretext of necessity, or disguised by arguments of expediency, may yet establish precedents which may ultimately devote a generous and unsuspecting people to all the consequences of usurped power.

Encroachments springing from a government whose organization can not be maintained without the co-operation of the States, furnish the strongest excitements upon the State Legislatures to watchfulness, and impose upon them the strongest obligation to preserve unimpaired the line of partition.

The acquiescence of the States under infractions of the federal compact, would either beget a speedy consolidation, by precipitating the State governments into impotency and contempt; or prepare the way for a revolution, by a repetition of these infractions, until the people are aroused to appear in the majesty of their strength. It is to avoid these calamities that we exhibit to the people the momentous question, whether the Constitution of the United States shall yield to a construction which defies every restraint and overwhelms the best hopes of republicanism.

Exhortations to disregard domestic usurpation, until foreign danger shall have passed, is an artifice which may be forever used; because the possessors of power, who are the advocates for its extension, can ever create national embarrassments, to be successively employed to soothe the people into sleep, whilst that power is swelling, silently, secretly, and fatally. Of the same character are insinuations of a foreign influence, which seize upon a laudable enthusiasm against danger from abroad, and distort it by an unnatural application, so as to bind your eyes against danger at home. *4 Writings of Madison, p. 509.*

### **Organization and Government of the State Legislature**

By constitutional provisions in the several states, or by common parliamentary law, the state legislature has the power—

- (a) To make rules for its own government and for the regulation of its legislative proceedings.
- (b) To choose its own officers in each house.
- (c) To exercise an exclusive right of determination upon the election and qualification of its own members.

(d) To control and discipline its members, for disorderly or contemptuous behavior, even to the extent of expelling them.

(e) To appoint committees and define their powers, and authorize them to send for persons and papers in the course of their investigations.

(f) To punish persons who may be guilty of contempts against it or breaches of its privileges.

(g) To secure uninterrupted service of all its members on the public business, by the exemption of each member from arrest on civil process while engaged in parliamentary duties or while going to or returning from the seat of government.

(h) To keep, in each house, a journal of its proceedings, the publication and amendment of which are within its power and discretion. *Black on Constitutional Law, 291-2.*

### Legislative Powers of the State

The legislative powers of the States as vested in the House of Representatives and the Senate are very much after the order of Congress. In fact, the legislative power vested in Congress by the Federal Constitution was largely patterned after the legislatures of the existing States. The division of governmental powers is practically the same in both the State and Federal Governments.

The rightful power of the legislature of a state extends to every subject of legislation, unless, in the particular instance, its exercise is forbidden, expressly or by necessary implication, by the constitution of the United States, a treaty, an act of congress, or the constitution of the state. *Black on Constitutional Law, 300.*

### Powers of Governor of the State

The powers and duties of a state governor are ordinarily as follows:

(a) He is to take care that the laws of the state are faithfully executed.

(b) He is to inform the legislature of the condition of the state, and to recommend such measures of legislation as he deems necessary or important.

(c) He may require information from the different officers of the executive department upon subjects relating to the duties of respective offices.

(d) He has the power of appointing certain of the officers of the state, and of removing officers for cause.

(e) He is commander in chief of the militia of the State.

(f) He has the power to grant pardons for offenses against the State, and reprieves.

(g) He has the power to convene the legislature in special session, and to adjourn them in certain cases.

(h) He has the power to veto bills passed by the legislature. *Black on Constitutional Law, 271.*

### Executive Officers of the State

The executive power in each of the states and territories is lodged in a chief magistrate, who is called the "governor."

In most of the states, there is a second executive officer, called "lieutenant governor," who is to succeed the governor in his office in case of death, resignation, removal, or disability of the latter.

The subordinate officers of a State government, after the governor and lieutenant governor, are ordinarily as follows:

- (a) The secretary of State.
- (b) The State treasurer.
- (c) The State comptroller.
- (d) The State auditor.
- (e) The attorney general.
- (f) The superintendent of public instruction. *Black on Constitutional Law, 267.*

### Judicial Powers of the State

The judicial power of each State is vested in a system of courts, comprising, generally, three classes—

(a) A court of last resort, possessing supreme appellate jurisdiction.

(b) A number of courts of equal and co-ordinate authority, each within its territorial limits, possessing general original jurisdiction, civil and criminal.

(c) Inferior courts, held by justices of the peace or police magistrates, possessing jurisdiction of minor civil causes and petty criminal offenses. *Black's Constitutional Law, 280.*

### Relation of States to Each Other and to the United States

The United States is given the power to enforce judgments of one state against another. This subject is fully discussed and decided in the recent case of *Va. v. W. Va.*, 38 Sup. Ct. Rept. p. 400, May 15, 1918.

### State and Federal Governments Compared

Both derive their powers from the people, the body politic. The people first granted the powers to the State sovereignties; and then the states, by and with the consent of their respective people, granted some of those powers to the Federal Government; some of these powers granted were in turn prohibited to the states; some of the powers granted were to be exercised by both, the states within their respective territories, and the federal within its jurisdiction. The states may exercise some powers, though they were granted to the Federal Government, if the Federal Government has not attempted to exercise the power so granted, but when the Federal Government does attempt to exercise them, the right of the State to exercise them



ceases. All powers not granted to the Federal Government were reserved to the states, or to the people. There are some rights and powers, which the people reserved unto themselves, and never granted to either government; these are called inalienable rights of the citizens; some of which are enumerated in the bills of right. Some of the rights originally granted to the states, and not expressly thereafter granted to the Federal Government, are expressly in the Federal Constitution prohibited to the states, and thus impliedly granted to the Federal Government. The Federal Government therefore has no powers except those granted expressly or impliedly, while the State has all which were not so granted by the Federal Constitution, or thereby prohibited to the states, or were not originally reserved by the people to themselves.

The people themselves, that is, the body politic thereof, is the only real sovereign; the State and Federal Governments are merely sovereigns as to the powers granted. The magistrates or officers of both are mere agents of the people, and trustees of the government whose powers they execute.

As a general rule, governments are unlimited in their powers. All free governments, perhaps all other governments, are entitled in some shape or other, to make laws, and to repeal, or amend them. This is called the legislative power of the government. There are, however, in the United States, two sets of governments, both occupying a part of the domain of the great functions of governments, including the executive, the legislative, and the judicial powers. *Miller's Const. p. 575.*

Mr. Jefferson was in favor of national power as to international affairs. In 1786 he wrote Mr. Madison:

It should ever be held in mind, that insult and war are the consequences of a want of respectability in the national character. As long as the States exercise, separately, those acts of power which respect foreign nations, so long will there continue to be irregularities committed by some one or other of them, which will constantly keep us on an ill footing with foreign nations. *5 Jefferson's Writings (mem. ed.) p. 278.*

In a letter to General Washington, August 14th, 1787, he wrote:

I remain in hopes of great and good effects from the decision of the Assembly over which you are presiding. To make our states one as to all foreign concerns, preserve them several as to all merely domestic, to give to the federal head some peaceable mode of enforcing its just authority, to organize that head into legislative, executive, and judiciary departments, are great desiderata in our federal constitution. *6 Jefferson's Writings, (mem. ed.), p. 275.*

In writing to Mr. Wythe, September 16, 1787, Mr. Jefferson in answering questions propounded as to the Constitution proposed, said:

You ask me in your letter, what ameliorations I think necessary in our federal constitution. It is now too late to answer the question, and it would always have been presumption in me to have done it. Your own ideas, and those of the great characters who were to be concerned with you in these discussions, will give the law, as they ought to do, to us all. My own general idea was, that the States should severally preserve their sovereignty in whatever concerns themselves alone, and that whatever may concern another State, or any foreign nation, should be made a part of the federal sovereignty; that the exercise of the federal sovereignty should be divided among three several bodies, legislative, executive, and judiciary, as the State sovereignties are; and that some peaceable means should be contrived, for the federal head to force compliance on the part of the States. *6 Jefferson's Writings (mem. ed.), pp. 299-300.*

The State government or its Legislature, can declare any act of an individual an offense or crime, which is by the Legislature declared detrimental to the public good, and can prescribe a punishment therefor; while the Federal Government acting through Congress, can only punish offenses against the few powers it exercises, such as the mails, commerce, coining money, and as for counterfeiting coins or its currency or bonds.

Both governments can levy taxes, but the purposes for which either can levy is for public purposes only; the Constitution, State and Federal imposes limitations upon both; the State may impose for any public purpose not prohibited, while Congress can levy only for the purposes authorized. *Miller's Const. p. 104.*

Congress can not prohibit a trade which is wholly within a State, such is strictly a State police regulation. *9 Wall, 41.*

### **States Not Antagonistic to Federal Government**

Mr. Calhoun said:

It was a great mistake to suppose that the states would naturally stand in antagonistic relations to the Federal Government; or that there would be any disposition on their part to diminish its power or to weaken its influence. They naturally stand in a reverse relation—pledged to cherish, uphold, and support it. They freely and voluntarily created it, for the common good of each and of all—and will cherish and defend it so long as it fulfills those objects. If its safe-keeping can not be intrusted to its creators, it can be safely placed in the custody of no other hands. *1 Calhoun's Works, p. 312.*

### **Conflict Between State and Federal Laws**

Acts of Congress passed in pursuance of the Constitution are also the "supreme law of the land." Hence any act of Congress which is valid and constitutional is supreme as against any law of a State which conflicts with it. When a State statute and a Federal statute operate

upon the same subject-matter, and prescribe different rules concerning it, and the Federal statute is one within the competency of Congress to enact, the State statute must give way; it is in effect no law, but an abortive attempt to exercise a power not possessed by the State Legislature. Such is the effect when a conflict is found to arise between a State statute and the act of Congress called the "interstate commerce law." So also, when Congress exercises its power to enact a bankruptcy law, that law becomes the supreme law of the land, and supersedes all State legislation dealing with the subject of insolvency. And again, the patent laws of the United States are supreme as against all State laws the enforcement of which would be inconsistent with the rights acquired under the Federal Legislation. *Columbia Wire Co. v. Freeman Wire Co.*, 71 Fed. 302. *Black on Constitutional Laws*, 33.

### Relation of the States to the General Government

Mr. Calhoun's school of statesmen, asserted the following as the relation the States have to the General government, and it is thus stated by Mr. Calhoun:

The great and leading principle is, that the General Government emanated from the people of the several States, forming distinct political communities, and acting in their separate and sovereign capacity, and not from all of the people forming one aggregate political community; that the Constitution of the United States is, in fact, a compact, to which each State is a party, in the character already described, and that the several States, or parties, have a right to judge of its infractions; and in case of a deliberate, palpable, and dangerous exercise of power not delegated, they have the right, in the last resort, to use the language of the Virginia Resolution, "*to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them.*" This right of interposition, thus solemnly asserted by the State of Virginia, be it called what it may—State-right, veto, nullification, or by any other name—I conceive to be the fundamental principle of our system, resting on facts historically as certain as our revolution itself, and deductions as simple and demonstrative as that of any political or moral truth whatever; and I firmly believe that on its recognition depend the stability and safety of our political institutions.

I am not ignorant that those opposed to the doctrine have always, now and formerly, regarded it in a very different light, as anarchical and revolutionary. *6 Calhoun's Works*, pp. 60-61.

Should the General Government and a State come into conflict, we have a higher remedy: the power which called the General Government into existence, which gave it all its authority, and can enlarge, contract, or abolish its powers at its pleasure, may be invoked. The States themselves may be appealed to—three-fourths of which, in fact, form a power, whose decrees are the Constitution itself, and whose voice can silence all discontent. The utmost extent, then, of the power is, that a State acting in its sovereign capacity as one of the parties to the constitutional compact, may compel the Government, created by that compact, to submit a question touching its infraction, to the parties who created it; to avoid the supposed dangers of which, it is proposed

to resort to the novel, the hazardous, and, I must add, fatal project of giving to the General Government the sole and final right of interpreting the Constitution—thereby reversing its will, instead of a rule of action impressed on it at its creation, and annihilating, in fact, the authority which imposed it, and from which the Government itself derives its existence. *6 Calhoun's Works, pp. 68-9.*

The above is a thought in which Jefferson, Madison, Calhoun and Lincoln, all agreed that all questions and differences as to state-rights should be settled by a convention of all the states in the mode provided in the Constitution itself. Such a convention would have settled the question of nullification of slavery and of secession; and it would now settle that of Socialism, Communism and anarchy, which threatens to destroy both State and Federal Governments.

Jefferson Davis' views on this subject follow:

1. That the States of which the American Union was formed, from the moment when they emerged from their colonial or provincial condition, became severally sovereign, free, and independent States—not one State, or nation.

2. That the union formed under the Articles of Confederation was a compact between the States, in which these attributes of "sovereignty, freedom and independence," were expressly asserted and guaranteed.

3. That, in forming the "more perfect union," of the Constitution, afterward adopted, the same contracting powers formed an *amended compact*, without any surrender of these attributes of sovereignty, freedom, and independence, either expressed or implied: on the contrary, that, by the tenth amendment to the Constitution, limiting the power of the Government to its express grants, they distinctly guarded against the presumption of a surrender of anything by implication.

4. That political sovereignty resides, neither in industrial citizens, nor in organized masses nor in tractional subdivisions of a community, but in the people of an organized political body.

5. That no "republican form of government," in the sense in which that expression is used in the Constitution, and was generally understood by the founders of the Union—whether it be the government of a State or of a confederation of States—is possessed of any sovereignty whatever, but merely exercises certain powers delegated by the sovereign authority of the people, and subject to recall and reassumption by the same authority that conferred them. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 157.*

Mr. Webster, in a speech in Virginia in 1851, said:

"If the south were to violate any part of the Constitution intentionally and systematically, and persist in so doing year after year, and no remedy could be had, would the North be any longer bound by the rest of it? And if the North, were, deliberately, habitually, and of fixed purpose, to disregard one part of it, would the South be bound any longer to observe its other obligations?"



"How absurd it is to suppose that, when different parties enter into a compact for certain purposes, either can disregard any one provision, and expect, nevertheless, the other to observe the rest! . . .

"I have not hesitated to say, and I repeat, that, if the Northern States refuse, willfully and deliberately, to carry into effect that part of the Constitution which respects the restoration of fugitive slaves, and Congress provides no remedy, the South would no longer be bound to observe the compact. A bargain can not be broken on one side, and still bind the other side." *Davis on The Rise and Fall of The Confederate Government, Vol. I, 167.*

Entirely in accord with these truths are the arguments of Mr. Madison, in the "Federalist," to show that the great principles of the Constitution are substantially the same as those of the Articles of Confederation. He says:

"I ask, What are these principles? Do they require that, in the establishment of the Constitution, the States should be regarded as distinct and independent sovereigns? They *are* so regarded by the Constitution proposed. . . . Do these principles, in fine, require that the powers of the General Government should be limited, and that, beyond this limit, the states should be left in possession of their sovereignty and independence? We have seen that, in the new Government as in the old, the general powers are limited; and that the states, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction."

"The truth is," he adds, "that the great principles of the Constitution proposed by the Convention may be considered *less absolutely new, than as the expansion of principles which are found in the Articles of Confederation.*" *Davis on The Rise and Fall of The Confederate Government, Vol. I, 170-1.*

Mr. Everett says: "The states are not named in it; the word sovereignty does not occur in it; the right of secession is as much ignored in it as the procession of the equinoxes." We have seen how very untenable is the assertion that the states are not named in it, and how much pertinency or significance in the omission of the *word* "sovereignty." The pertinent question that occurs is, Why was so obvious an attribute of sovereignty not expressly renounced if it was intended to surrender it? It certainly existed; it was not surrendered; therefore it still exists. This would be a more national and rational conclusion than that it has ceased to exist because it is not mentioned.

The simple truth is, that it would have been a very extraordinary thing to incorporate into the Constitution any express provision for the secession of the states and dissolution of the Union. Its founders undoubtedly desired and hoped that it would be perpetual; against the proposition for power to coerce a State, the argument was that it would be a means, not of preserving, but of destroying, the Union. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 172.*

The ratification of the Constitution by Virginia has already been quoted, in which the people of that State, through their Convention, did expressly "declare, and make known that the powers granted under the Constitution, being derived from the people of the United

States, *may be resumed by them*, whensoever the same shall be perverted to their injury or oppression, and that every power not granted thereby remains with them and at their will."

New York and Rhode Island were no less explicit, both declaring that "the powers of government *may be reassumed by the people* whenever it shall become necessary to their happiness."

These expressions are not mere *obiter dicta*, thrown out incidentally, and entitled only to be regarded as an expression of opinion by their authors. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 173.*

In the language of the Declaration of Independence, "All experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." Would not real grievances be rendered more tolerable by the consciousness of power to remove them; and would not even imaginary wrongs be embittered by the manifestation of a purpose to make them perpetual? To ask these questions is to answer them.

The wise and brave men who had, at much peril and great sacrifice, secured the independence of the states, were as little disposed to surrender the sovereignty of the states as they were anxious to remedy the defects of the Confederation. The Union they formed was not to destroy the states, but to "secure the blessings of liberty to ourselves and our posterity." *Davis on The Rise and Fall of The Confederate Government, Vol. I, 176.*

Edmund Randolph, Governor of Virginia, although the mover of the original proposition to authorize the employment of the forces of the Union against a delinquent member, which had been so signally defeated in the Federal Convention, afterward in the Virginia Convention, made an eloquent protest against the idea of the employment of force against the State. "What species of military coercion could the General Government adopt for the enforcement of obedience to its demands? Either an army sent into the heart of a delinquent State, or blocking up its ports. Have we lived to this, then, that, in order to suppress and exclude tyranny, it is necessary to render the most affectionate friends the most bitter enemies, set the father against the son, and make the brother slay the brother? Is this the happy expedient that is to preserve liberty? Will it not destroy it? If any army be once introduced to force us, if once marched into Virginia, figure to yourselves what the dreadful consequence will be; the most lamentable civil war must ensue."

We have seen already how vehemently the idea of *judicial* coercion was repudiated by Hamilton, Marshall, and others. The suggestion of *military* coercion was uniformly treated, as in the above extracts, with still more abhorrence. No principle was more fully and firmly settled on the highest authority than that, under our system, there could be no coercion of a State. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 178-9.*

The Boston memorial to Congress as prepared by a committee with Mr. Webster at its head, said that the new States "are universally

considered as admitted into the Union upon the same footing as the original states, and as possessing, in respect to the Union, the same rights of *sovereignty, freedom, and independence*, as the other states."

But, with regard to States formed of territory acquired by purchase from France, Spain, and Mexico, it is claimed that, as they were bought by the United States, they belong to the same, and have no right to withdraw at will from an association the property which had been purchased by the other parties.

Happy would it have been if the equal rights of the people of all the States to the enjoyment of territory acquired by the common treasure could have been recognized at the proper time! There would then have been no secession and no war. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 181.*

The treaty by which the Louisiana territory was ceded to the United States expressly provided that the inhabitants thereof should be "admitted, as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States." In all other acquisitions of territory the same stipulation is either expressed or implied. Indeed, the denial of the right would be inconsistent with the character of American political institutions. *Davis on The Rise and Fall of The Confederate Government, Vol. I, 181-2.*

Mr. Calhoun thus states his view of the relation:

They ordained and established all the parts; first, by their separate action, their respective State governments; and next, by their concurrent action, with the indispensable co-operation of their respective governments, they ordained and established a common government, as a supplement to their separate governments. The object was to do that, by a *common agent*, which could not be as well done, or done at all, by their separate agencies. The relation, then, in which the States stand to the system, is that of the creator to the creature; and that, in which the two governments stand to each other, is of coequals and co-ordinates—as has been fully established:—with the important difference, in this last respect, that the separate governments of the States were the first in the order of time, and that they exercised an active and indispensable agency in the creation of the common government of all the States; or, as it is styled, the government of the United States.

Such is their true position;—a position, not only essential in *theory*, in the *formation* of a federal government—but to its *preservation* in *practice*. Without it, the system could not have been formed,—and without it, it cannot be preserved. *I Calhoun's Works, p. 382.*

## Relations of the States to One Another

The Supreme Court's view:

If the States of the Union were possessed of an absolute sovereignty, instead of a limited one, they could demand of each other reparation for an unlawful invasion of their territory and the surrender of parties committing the offence, and in case of refusal to comply with the demand, could resort to reprisals, or take any other measure they might deem necessary as redress for the past and security for the future. But

the states of the Union are not absolutely sovereign. Their sovereignty is qualified and limited by the conditions of the Federal Constitution. They can not declare war or authorize reprisals on other states. Their ability to prevent the forcible abduction of persons from their territory consists solely in their power to punish all violations of their criminal laws committed within it, whether by their own citizens or by citizens of other states. 127 U. S. 704-5.

### “Powers of States Internal; of United States External”

Mr. Madison makes the following remarks on this classification:

It must be confessed, that the classification of constitutional powers into external and internal, though often used to express the division between Federal and State powers, is liable to too many exceptions to be a safe guide, without keeping the exceptions in view. Not only do the Federal powers, which have been referred to as external, operate internally, but some of the internal powers, whether exercised by the one government or the other, have also an external operation. Excises or direct taxes on vending of imports, if employed by the State authorities, must have a bearing on imports or exports, as real and material as duties imposed on them. On the other hand, certain Federal powers have an operation altogether internal, as in the case of the post office, direct taxes, &c. Occasionally the definition of the Federal power is extended to the relations with and between the States, as well as to the relations with foreign nations. But the definition is still defective. Questions arising under a bankrupt law, and under State laws violating contracts, though between *citizens of the same State*, are within the Federal jurisdiction.

The constitution of the United States is truly *sui generis*; and in expounding it, the delineation and distribution of power on the face of it must never be overlooked. 4 *Writings of Madison*, pp. 256-7.

### States as Parties to the Constitution

The Constitution of the United States was formed by the sanction of the States, given by each in its sovereign capacity. It adds to the stability and dignity, as well as to the authority of the Constitution, that it rests on this legitimate and solid foundation. The States, then, being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity that there can be no tribunal above their authority to decide, in the last resort, whether the compact made by them be violated; and, consequently, that, as the parties to it, they must themselves decide, in the last resort, such questions as may be of sufficient magnitude to require their interposition. 4 *Writings of Madison*, p. 517.

It does not follow, however, because the States, as sovereign parties to their constitutional compact, must ultimately decide whether it has been violated, that such a decision ought to be interposed either in a hasty manner or on doubtful and inferior occasions. Even in the case of ordinary conventions between different nations, where, by the strict rule of interpretation, a breach of a part may be deemed a breach of the whole—every part being deemed a condition of every other part,



and of the whole—it is always laid down that the breach must be wilful and material, to justify an application of the rule. But in the case of an intimate and constitutional union, like that of the United States, it is evident that the interposition of the parties, in their sovereign capacity, can be called for by occasions only deeply, essentially affecting the vital principles of their political system. 4 *Writings of Madison*, p. 518.

### States' Rights

The following are some of the powers claimed for the states, by Mr. Calhoun, Hayne and other States Right advocates, which were not acceded to by Mr. Webster, but disputed by him; he thus states the claims:

I understand the honorable gentleman from South Carolina to, maintain, that it is a right of the State Legislatures to interfere, whenever, in their judgment, this government transcends its constitutional limits, and to arrest the operation of its laws.

I understand him to maintain this right, as a right existing *under* the Constitution, not as a right to overthrow it on the ground of extreme necessity, such as would justify violent revolution.

I understand him to maintain an authority, on the part of the States, thus to interfere, for the purpose of correcting the exercise of power by the general government, of checking it, and of compelling it to conform to their opinion of the extent of its powers.

I understand him to maintain, that the ultimate power of judging of the constitutional extent of its own authority is not lodged exclusively in the general government, or any branch of it; but that, on the contrary, the States may lawfully decide for themselves, and each State for itself, whether, in a given case, the act of the general government transcends its power.

I understand him to insist, that, if the exigency of the case, in the opinion of any State government, require it, such State government may, by its own sovereign authority, annul an act of the general government which it deems plainly and palpably unconstitutional. 3 *Webster's Works*, (7th. ed.), p. 318.

Mr. Hayne here rose and said, that for the purpose of being clearly understood, he would state that his proposition was in the words of the Virginia resolution, as follows: "That this assembly both explicitly and permanently declare, that it views the powers of the Federal government, as resulting from the compact to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact, as no farther valid than they are authorized by the grants enumerated in that compact; and that, in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the States who are parties thereto have the right, and are in duty bound to interpose, for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them." 3 *Webster's Works*, (7th. ed.), p. 319.

Mr. Hayne further said: He did not contend for the mere right of revolution, but for the right of constitutional resistance. What he

maintained was, that in case of a plain, palpable violation of the Constitution by the general government, a State may interpose; and that this interposition is constitutional. *3 Webster's Works, (7th. ed.), p. 320.*

Mr. Webster thus answered these claims:

I say the right of a State to annul a law of Congress can not be maintained, but on the ground of the inalienable right of man to resist oppression; that is to say, upon the ground of revolution. I admit that there is an ultimate, violent remedy, above the Constitution and in defiance of the Constitution, which may be resorted to when a revolution is to be justified. But I do not admit, that, under the Constitution and in conformity with it, there is any mode in which a State government, as a member of the Union, can interfere and stop the progress of the general government, by force of her own laws, under any circumstance whatever. *3 Webster's Works, (7th. ed.), p. 321.*

I was forcibly struck, Sir, with one reflection, as the gentleman went on in his speech. He quoted Mr. Madison's resolutions, to prove that a State may interfere, in a case of deliberate, palpable, and dangerous exercise of a power not granted. The honorable member supposes the tariff law to be such an exercise of power; and that consequently a case has arisen in which the State may, if it see fit, interfere by its own law. Now it so happens, nevertheless, that Mr. Madison deems this same tariff law quite constitutional. Instead of a clear and palpable violation, it is, in his judgment, no violation at all. So that, while they use his authority for a hypothetical case, they reject it in the very case before them. All this, Sir, shows the inherent futility, I had almost used a stronger word, of conceding this power of interference to the State, and then attempting to secure it from abuse by imposing qualifications of which the States themselves are to judge. One of two things is true; either the laws of the Union are beyond the discretion and beyond the control of the States; or else we have no constitution of general government, and are thrust back again to the days of the Confederation. *3 Webster's Works, (7th. ed.), p. 331.*

The following is Mr. Webster's explanation of the Virginia Resolutions, which was the Bible of Democracy for half a century, and were drafted by Madison under the advice of Jefferson:

I wish now, Sir, to make a remark upon the Virginia resolutions of 1798. I can not undertake to say how these resolutions were understood by those who passed them. Their language is not a little indefinite. In the case of the exercise by Congress of a dangerous power not granted to them, the resolutions assert the right, on the part of the State, to interfere and arrest the progress of the evil. This is susceptible of more than one interpretation. It may mean no more than that the States may interfere by complaint and remonstrance, or by proposing to the people an alteration of the Federal Constitution. This would all be quite unobjectionable. Or it may be that no more is meant than to assert the general right of revolution, as against all governments, in cases of intolerable oppression. This no one doubts, and this, in my opinion, is all that he who framed the resolutions could

have meant by it; for I shall not readily believe that he was ever of opinion that a State, under the Constitution and in conformity with it, could, upon the ground of her own opinion of its unconstitutionality, however clear and palpable she might think the case, annul a law of Congress, so far as it should operate on herself, by her own legislative power. *3 Webster's Works, (7th. ed.), p. 332.*

Ever since the foundation of the Union, two schools of statesmen have been found, divided in their views on the nature and boundaries of state rights. According to one school, the Federal constitution is to be subjected to the national government and a liberal interpretation for the preservation of the autonomy of the States. According to the other school, the rule of interpretation is to be reversed. Those holding the one opinion contend that the government of the Union should be held strictly to the exercise of the powers expressly granted to it, and that its province and jurisdiction should not be enlarged by implication. According to the other party, the true theory of our government and institutions is in favor of such a construction of the constitution as will give the Federal government the largest measure of power which is compatible with the continued and useful existence of the States. *Black on Constitutional Laws, 25.*

Between these two extremes lies the truth. Although the two theories of construction, strict and liberal, still subsist, it is now quite generally agreed that both the several states and the Union are supreme, each within its own appropriate sphere; that the rights of the individual state and of the Union are equally necessary to be preserved and must be accommodated to each other; that the authorities of the Union are to judge of the extent of the powers granted to it; that the rightful autonomy of each state is beyond the reach of Federal interference; and that the Union is perpetual and indissoluble. *Black on Constitutional Laws, 25-6.*

### Bancroft's view of States' Rights.

Except for the powers granted to the Federal government, each state is in all things supreme, not by grace, but of right. The United States may not interfere with any ordinance or law that begins and ends within the state. This supremacy of the states in the powers which have not been granted is as essentially a part of the system as the supremacy of the general government in its sphere. The states are at once the guardians of the domestic security and the happiness of the individual, and they are the parents, the protectors, and the stay of the Union. The states are members of the United States as one great whole; and the one is as needful as the other. The powers of government are not divided between them; they are distributed; so that there need be no collision in their exercise. The union without self-existent states is a harp without strings; the states without union are the chords that are unstrung. But for state rights the union would perish from the paralysis of its limbs. The states, as they gave life to the union, are necessary to the continuance of that life. Within their own limits they are the guardians of industry, of property, of personal rights, and of liberty. But state rights are to be defended inside of the Union; not from the outside citadel from which the union may be struck at or defiled. The states and the United States are not

antagonists; the states in union form the Federal republic; and the system can have life and strength and health and beauty only by their harmonious action. In short, the constitution knows nothing of United States alone, or states alone; it adjusts the parts harmoniously in an organized unity. Impair the relations or the vigor of any part, and the disease enters into the veins of the whole. That there may be life in the whole, there must be healthy life in every part. The United States are the states in Union; these are so inwrought into the Constitution that the one can not perish without the other. *Bancroft on the History of the Constitution of the United States, 448-9.*

Rome, in annexing the cities around itself, had not given them equal influence with itself in proportion to their wealth and numbers, and consequently there remained a cause of dissatisfaction never healed. America has provided for admission of new states upon equal terms, and only upon equal terms, with the old ones.

For Europe there remained the sad necessity of revolution. For America the gates of revolution are shut and barred and bolted down, never again to be thrown open; for it has found a legal and peaceful way to introduce every amelioration. Peace and citizenship and perfect domestic free-trade are to know no end. The constitution is to the American people a possession for all ages; it creates an indissoluble union of imperishable states.

The Federal republic will carry tranquillity, and freedom, and order throughout its vast domain. *Bancroft on History of the Constitution of the United States, 450.*

#### Mr. Bryce's view of States' Rights.

What State sovereignty means and includes is a question which incessantly engaged the most active legal and political minds of the nation from 1789 down to 1870. Some thought it paramount to the rights of the Union. Some considered it as held in suspense by the Constitution, but capable of reviving as soon as a State should desire to separate from the Union. Some maintained that each State had in accepting the Constitution finally renounced its sovereignty, which thereafter existed only in the sense of such an undefined domestic legislative and administrative authority as had not been conferred upon Congress. The conflict of these views, which became acute in 1830, when South Carolina claimed the right of nullification, produced Secession and the war of 1861-65. Since the defeat of the Secessionists, the last of these views may be deemed to have been established, and the term "State sovereignty" is now but seldom heard. Even "State rights" have a different meaning from that which they had thirty years ago. *Bryce's American Commonwealth, Vol. I, 408.*

In 1820 Mr. Jefferson spoke of the encroachments which Federal judiciary were making upon the States' powers. Of it he thus wrote:

I am sensible of the inroads daily making by the Federal, into the jurisdiction of its co-ordinate associates, the State Governments. The legislative and executive branches may sometimes err, but elections and dependence will bring them to rights. The judiciary branch is the instrument which, working like gravity, without intermission, is to



press us at last into one consolidated mass. Against this I know no one who, equally with Judge Roane himself, possesses the power and the courage to make resistance; and to him I look, and have long looked, as our strongest bulwark. If Congress fails to shield the States from dangers so palpable and so imminent, the States must shield themselves, and meet the invader foot to foot. *15 Jefferson's Writings, (Mem. ed.), p. 307.*

The power of taxation by the Federal government upon the subjects and in the manner described by the Internal Revenue Act of June 30, 1864, is undoubted. There are, however, certain departments which are excepted from the general power. The right of the states to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court, and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressive. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other. *17 Wall. 322. 157 U. S. 603.*

### Powers of the States

The Legislatures of the States have a right also to originate amendments to the Constitution, by a concurrence of two-thirds of the whole number, in applications to Congress for the purpose. When new States are to be formed by a junction of two or more States, or parts of States, the Legislatures of the States concerned are, as well as Congress, to concur in the measure. The States have a right also to enter into agreements or compacts, with the consent of Congress. In all such cases a communication among them results from the object which is common to them. *4 Writings of Madison, p. 553.*

The States can not rid themselves of their obligations otherwise than by the honest payment of the debt. They can pass no law impairing the obligation of their own contracts. They can make nothing a tender, in discharge of such contracts, but gold and silver. They possess all adequate power of providing for the case, by taxes and internal means of revenue. They can not get around their duty, nor evade its force. Any failure to fulfil its undertakings would be an open violation of public faith, to be followed by the penalty of dishonor and disgrace; a penalty, it may be presumed, which no State of the American Union would be likely to incur. *6 Webster's Works, (7th. ed.), p. 540.*

In 1833, Baring Brothers of London, asked the opinion of Mr. Webster, as to the power of the States to borrow money, and a part of his reply was as follows:

Your first inquiry is, "whether the Legislature of one of the States had legal and constitutional power to contract loans at home and abroad." To this I answer, that the Legislature of a State has such power; and how any doubt could have arisen on this point it is difficult for me to conceive.

Every State is an independent, sovereign, political community, except insofar as certain powers, which it might otherwise have exercised, have been conferred on a general government, established under a written constitution, and exercising its authority over the people of all the States. This general government is a limited government. Its powers are specific and enumerated. All powers not conferred on it still remain with the States or with the people. The State legislatures, on the other hand, possess all usual and ordinary powers of government, subject to any limitations which may be imposed by their own constitutions, and with the exception, as I have said, of the operation on those powers of the Constitution of the United States.

The powers conferred on the general government can not, of course, be exercised by any individual State; nor can any State pass any law which is prohibited by the Constitution of the United States. *6 Webster's Works, (7th. ed.), p. 537.*

Thus no State can by itself make war, or conclude peace, or enter into alliances or treaties with foreign nations. In these, and in other important particulars, the powers which would have otherwise belonged to the State can now be exercised only by the general government, or the government of the United States. Nor can a State pass a law which is prohibited by its own constitution. But there is no provision in the Constitution of the United States, nor, so far as I know or have understood, in any State constitution, prohibiting the Legislature of a State from contracting debts, or making loans either at home or abroad. Every State has the power of levying and collecting taxes, direct and indirect, of all kinds, except that no State can impose duties on goods and merchandise imported, that power belonging exclusively to Congress by the Constitution. That power of taxation is exercised by every State, habitually and constantly, according to its own discretion and the exigencies of its own government. *6 Webster's Works, (7th. ed.), p. 538.*

### Reserved Powers of States

The reserved powers of the States in the regulation of their internal affairs must be exercised consistently with the powers delegated to the United States. If there be a conflict, the powers delegated must prevail, being so much authority taken from the States by the express sanction of their people; for the Constitution itself declares that laws made in pursuance of it shall be the supreme law of the land. But those powers which authorize legislation touching the health, morals, good order, and peace of their people were not delegated, and are not so essential to the existences and prosperity of the States that it is not to be presumed that they will be encroached upon so as to impair their reasonable exercise.

How can these reserved powers be reconciled with the conceded power of Congress to regulate interstate commerce? As said above, the State can not exclude an article from commerce, and consequently from importation simply by declaring that its policy requires such exclusion. *125 U. S., 503.*

It is the undoubted and reserved power of every State here, as a political body, to decide, independent of any provisions made by Congress, though subject not to conflict with any of them when rightful,

who shall compose the population, who become its residents, who its citizens, who enjoy the privileges of its laws, and be entitled to their protection and favor, and what kind of property and business it will tolerate and protect. And no one government, or its agents or navigators, possess any right to make another State, against its consent, a penitentiary, or hospital, or poor-house farm, for its wretched outcasts, or a receptacle for its poisons to health, and instruments of gambling and debauchery. Indeed, the United States Supreme Court has deliberately said: "We entertain no doubt whatsoever, that the States, in virtue of their general police power, possess full justification to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly do in cases of idlers, vagabonds and paupers." 16 Pet. 625. 5 How. 629.

The Supreme Court thus spoke of these powers:

Many State laws are such, that their expediency and justice may be doubted widely by this tribunal; but this confers no authority on us to nullify them, nor is any such authority, for such a cause, conferred on Congress by any part of the Constitution. The States stand properly on their reserved rights, within their own powers and sovereignty to judge of the expediency and wisdom of their own laws; and while they take care not to violate clearly any portion of the Constitution or statutes of the general government, our duty to that Constitution and laws, and our respect for State rights, must require us not to interfere. 5 How., 631.

It has been frequently decided by the United States Supreme Court "that the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the States, or restrained by the Constitution of the United States; and that consequently, in relation to these, the authority of a State is complete, unqualified, and conclusive." Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint of the public peace, health, and morals, must come within this category.

As subjects of legislation, they are from their very nature, of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty; and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience, or luxury, to recede, when they come in conflict or collision, *salus populi suprema lex*. 5 How., 632.

The tenth amendment of the Constitution declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Before the adoption of the Constitution, the States possessed, respectively, all the attributes of sovereignty. In their organic laws they had distributed their powers of government according to their own views, subject to such modifications as the people of each State might sanction. The agencies established by the articles of confederation were not entitled to the dignified appellation of government. Among the delegated functions, it is declared that "Congress shall have power to regulate commerce with foreign nations, and among the sev-

eral States, and with the Indian tribes." This investiture of power is declared by the United States Supreme Court, in 9 Wheat. 1, to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution.

There may be a limitation on the exercise of sovereign powers, but that State is not sovereign which is subject to the will of another. This remark applies equally to the Federal and state governments. The Federal government is supreme within the scope of its delegated powers, and the state governments are equally supreme in the exercise of those powers not delegated by them nor inhibited to them. From this it is clear, that while these supreme functions are exercised by the Federal and State governments within their respective limitations, they can never come in conflict. And when a conflict occurs, the inquiry must necessarily be, which is paramount law? And that must depend upon the supremacy of the power by which it was enacted. The Federal government is supreme in the exercise of powers delegated to it, but beyond this, its acts are unconstitutional and void. So the acts of the States are void, when they do that which is inhibited to them, or exercise a power which they have exclusively delegated to the Federal government. 5 *How.*, 588.

Sacred as these reserved powers are regarded, the court is particular to declare with emphasis the supreme and paramount authority of the Constitution and laws of the United States, relating to the regulation of commerce with foreign nations, and among the several States; and when any of them are so exercised as to come into conflict with the free course of the powers vested in Congress, the law of the State must yield to the supremacy of the Federal authority, though such law must have been enacted in the exercise of a power undelegated and indisputably reserved to the States. 128 *U. S.*, 18.

It is admitted that, in regard to the commercial, as to other powers, the States can not be held to have parted with any of the attributes of sovereignty which are not plainly vested in the Federal government and inherited to the States, either expressly or by necessary implication. This implication may arise from the nature of the power. In the same section which gives the commercial power to Congress, is given power "to borrow money on the credit of the United States," "to establish postoffices and post-roads," "to define and punish piracies and felonies committed on the high seas," "to declare war," "to provide and maintain a navy," &c., and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

Only one of these powers is, in the Constitution, expressly inhibited to the States; and yet, from the nature of the other powers, they are equally beyond State jurisdiction. 7 *How.*, 394.

When the commercial power was under discussion in the convention which formed the Constitution, Mr. Madison observed, that he was more and more convinced that the regulation of commerce was in its nature indivisible, and ought to be wholly under one authority." Mr. Sherman said: "The power of the United States to regulate trade, being supreme, can control interferences of the State regulations when such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction." Mr. Langdon insisted that the regu-



lation of trade be regulated by Congress, and that the States ought to have nothing to do with it. And the motion carried, "that no State shall lay any duty on tonnage without the consent of Congress." *3 Madison Papers, 1585, 1586.*

The adoption of the above provision in the Constitution, and also the one in the same section: "That no State shall, without the assent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress,"—is a restriction, it is contended, upon the acknowledged power of the States. *7 How., 396.*

The reservation of power of the State, evidently related to subjects in which the general government had no separate interest; and they would have been altogether unnecessary and useless if the State had not considered the preceding part of the law as the proffer of a compact which was to be obligatory upon it, if assented to by Congress. *3 How., 745.*

In the great case of *Gibbons v. Ogden*, 9 Wheat. 1, where Chief Justice Marshall, after enumerating some of the powers reserved to the State, says: "They form a portion of that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass." And he adds (what is very pertinent to this discussion): "No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given." *118 U. S., 584.*

### Powers and Functions of States

Mr. Bryce thus well describes the power and functions of States:

The power of a State over all communities within its limits is absolute. It may grant or refuse local government as it pleases. The population of the city of Providence is more than one-third of that of the State of Rhode Island, the population of New York city more than one-fifth that of the State of New York. But the State might in either case extinguish the municipality, and govern the city by a single State commissioner appointed for the purpose, or leave it without any government whatever. The city would have no right of complaint to the Federal President or Congress against such a measure. Massachusetts has lately remodeled the city government of Boston just as the British Parliament might remodel that of Birmingham. Let an Englishman imagine a county council for Warwickshire, imagine the municipality of Birmingham, or a Frenchman imagine the department of the Rhone extinguishing the municipality of Lyons, with no possibility

of intervention by the central authority, and he will measure the difference between the American States and the local governments of Western Europe.

A State commands the allegiance of its citizens, and may punish them for treason against it. The power has rarely been exercised, but its undoubted legal existence had much to do with inducing the citizens of the Southern States to follow their governments into secession in 1861. They conceived themselves to owe allegiance to the State as well as to the Union, and when it became impossible to preserve both, because the State had declared its secession from the Union, they might hold the earlier and nearer authority to be paramount. Allegiance to the State must now, since the war, be taken to be subordinate to allegiance to the Union. But allegiance to the State still exists; treason against the State is still possible. One can not think of treason against Warwickshire or the department of the Rhone.

These are illustrations of the doctrine which Europeans often fail to grasp, that the American States were originally in a certain sense, and still for certain purposes remain, sovereign States. *Bryce's American Commonwealth, Vol. I, 407.*

What State sovereignty means and includes is a question which incessantly engaged the most active legal and political minds of the nation, from 1789 down to 1870. Some thought it paramount to the rights of the Union. Some considered it as held in suspense by the Constitution, but capable of reviving as soon as a State should desire to separate from the Union. Some maintained that each State had in accepting the Constitution finally renounced its sovereignty, which thereafter existed only in the sense of such an undefined domestic legislative and administrative authority as had not been conferred upon Congress. The conflict of these views, which became acute in 1830 when South Carolina claimed the right of nullification, produced Secession and the war of 1861-65. Since the defeat of the Secessionists, the last of these views may be deemed to have been established, and the term "State sovereignty" is now but seldom heard. Even "States rights" have a different meaning from that which they had thirty years ago. *Bryce's American Commonwealth, Vol. I, 408.*

Thus every American citizen lives in a duality of which Europeans, always excepting the Swiss, and to some extent the Germans, have no experience. He lives under two governments and two sets of laws; he is animated by two patriotisms and owes two allegiances. That these should both be strong and rarely be in conflict is most fortunate. It is the result of skillful adjustment and long habit, of the fact that those whose votes control the two sets of governments are the same persons, but above all of that harmony of each set of institutions with the other sets, a harmony due to the identity of the principles whereon both are founded, which makes each appear necessary to the stability of the other, the States to the nation as its basis, the National Government to the States as their protector. *Bryce's American Commonwealth, Vol. I, 412.*

The people of a State retain forever in their hands, altogether independent of the National government, the power of altering their Constitution. When a new Constitution is to be prepared, or the existing

one amended, the initiative usually comes from the legislature, which (by a simple successive legislature, as the Constitution may in each instance provide) submits the matter to the voters in one of the two ways. It may either propose to the people certain specific amendments, or it may ask the people to decide by a direct popular vote on the propriety of calling a constitutional Convention to revise the whole existing Constitution. In the former case the amendments suggested by the legislature are directly voted on by the citizens; in the latter the legislature, as soon as the citizens have voted for the holding of a convention, provides for the election by the people of this convention. When elected, the Convention meets, sets to work, goes through the old Constitution, and prepares a new one, which is then presented to the people for ratification or rejection at the polls. *Bryce's American Commonwealth, Vol. I, 419.*

A State Constitution is not only independent of the central government (save in certain points already specified), it is also the fundamental organic law of the State itself. The State exists as a commonwealth by virtue of its Constitution, and all State authorities, legislative, executive, and judicial, are the creatures of, and subject to, the State Constitution. Just as the President and Congress are placed beneath the Federal Constitution, so the Governor and Houses of a State are subject to its Constitution, and any act of theirs done either in contravention of its provisions, or in excess of the powers it confers on them, is absolutely void. *Bryce's American Commonwealth, Vol. I, 420.*

A State Constitution is really nothing but a law made directly by the people voting at the polls upon a draft submitted to them. The people of a State when they so vote act as a primary and constituent assembly, just as if they were all summoned to meet in one place like the folkmoets of our Teutonic forefathers. It is only their numbers that prevent them from so meeting in one place, and oblige the vote to be taken at a variety of polling places. Hence the enactment of a Constitution is an exercise of direct popular sovereignty to which we find few parallels in modern Europe, though it was familiar enough to the republics of antiquity, and has lasted till now in some of the cantons of Switzerland.

The importance of this character of a State Constitution as a popularly-enacted law, overriding every minor State law, becomes all the greater when the contents of these Constitutions are examined. Europeans conceive of a constitution as an instrument, usually a short instrument, which creates a frame of government, defines its departments and powers, and declares the "primordial rights" of the subject or citizen as against the rulers. An American State Constitution does this, but does more; and in most cases, infinitely more. It deals with a variety of topics which in Europe would be left to the ordinary action of the legislature, or of administrative authorities; and it pursues these topics into a minute detail hardly to be looked for in a fundamental instrument. *Bryce's American Commonwealth, Vol. I, 421-2.*

The National Government is an artificial creation, with no powers except those conferred by the instrument, which created it. A State Government is a natural growth, which *prima facie* possesses all the powers incident to any government whatever. Hence, if the question arises

whether a State legislature can pass a law on a given subject, the presumption is that it can do so; and positive grounds must be adduced to prove that it can not. It may be restrained by some inhibition either in the Federal Constitution, or in the Constitution of its own State. But such inhibition must be affirmatively shown to have been imposed, or, to put the same point in other words, a State Constitution is held to be, not a document conferring defined and specified powers on the legislature, but one regulating and limiting that general authority which the representatives of the people enjoy *ipso jure* by their organization into a legislative body.

"It has never been questioned that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written Constitutions. That must be conceded of to be a fundamental principle in the political organization of the American States. We can not well comprehend how, upon principle, it could be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several State legislatures, saving only such restrictions as are imposed by the Constitution of the United States or of the particular State in question.

"The people, in framing the Constitution, committed to the legislature the whole law-making powers of the State which they did not expressly or impliedly withhold. Plenary power in the legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception."

It must not, however, be supposed from these dicta that even if the States were independent commonwealths, the Federal Government having disappeared, their legislatures would enjoy anything approaching the omnipotence of the British Parliament, "whose power and jurisdiction is," says Sir Edward Coke, "so transcendent and absolute that it can not be confined, either for persons or causes, within any bounds." "All mischiefs for grievances," adds Blackstone, "operations and remedies that transcend the ordinary course of the laws are within the reach of this extraordinary tribunal." Parliament being absolutely sovereign, can command, or extinguish and swallow up the executive and the judiciary, appropriating to itself their functions. But in America, a legislature is a legislature and nothing more. The same instrument which creates it creates also the executive governor and the judges. They hold by a title as good as its own. If the legislature should pass a law depriving the governor of an executive function conferred by the Constitution, that law would be void. If the legislature attempted to interfere with the jurisdiction of the courts, their action would be even more palpably illegal and ineffectual. *Bryce's American Commonwealth*, Vol. I, 428-9, 430.

### Limitations Upon Powers of States

These limitations are prescribed in the Constitution. They are of two classes, absolute and conditional. In the one case the States are absolutely prohibited from exercising the powers therein mentioned. Such as to make treaties, to grant letters



of marque and reprisal, to coin money, to emit bills of credit, etc.; they shall not impair the obligation of contracts nor pass ex post facto laws, nor make legal tender.

The conditional limitations are that the States shall not exercise certain powers, without the consent of Congress. Among these are to lay imposts or duties on imports or exports, except as inspection laws; or to lay any duty on tonnage; nor shall they keep troops or ships of war, in times of peace; nor shall they enter into any agreement or compact with other States or foreign powers.

The 13th, 14th and 15th amendments each imposed additional limitations upon the powers of the States. The United States has all the constitutional and international powers of the government; the States have all of the internal and domestic powers of government. It is only the first class that is prohibited to the States. The States, however, are the original sources of all powers which belong to both classes. The States also have reserved powers, while the United States has only granted powers, never having made a grant of any power, no occasion has arisen to reserve any.

Story thus states the limitations upon State powers.

It is a mistake that the Constitution was not designed to operate upon States in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the States in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon States. Surely, when such essential portions of State sovereignty are taken away, or prohibited to be exercised, it can not be correctly asserted that the Constitution does not act upon the States. The language of the Constitution is also imperative upon the States as to the performance of many duties. It is imperative upon the State legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of President and Vice-President. And in these, as well as some other cases, Congress have a right to revise, amend, or supersede the laws which may be passed by the State legislatures. *Story on the Constitution*, Vol. V, p. 522, § 1739.

The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States; and, if they are found to be contrary to the Constitution, may declare them of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

Nor can such a right be deemed to impair the independence of State judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect

to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the Constitution. *Story on the Constitution. Vol. V, p. 523, §§ 1739-70.*

In *Harrison v. St. Louis & San Francisco R. R.*, 232 U. S. 318, a statute of the State of Oklahoma which burdened or impeded the right of free access to the courts of the United States was held to be repugnant to the Constitution and the destructive effect of such legislation upon our institutions was pointed out. And light on the subject is afforded by a consideration of the ruling in *Tullock v. Mulvane*, 184 U. S. 497. See also *Insurance Co. v. Morse*, 20 Wall. 445, 453; *Clark v. Bever*, 139 U. S. 96, 102-103; 234 U. S. 472-3.

The Fourteenth Amendment was not intended to deprive the States of their power to establish and regulate judicial proceedings and that its provisions therefore only restrain acts which so transcend the limits of classification as to cause them to conflict with the fundamental conceptions of just and equal legislation. The proposition here relied upon therefore comes to this: that there is not such a distinction between the extraordinary proceeding by mandamus and the ordinary judicial proceedings as affords a ground for legislating differently concerning the two. But when thus reduced to its ultimate basis, the proposition answers itself, since it can not be formulated without demonstrating its own unsoundness. 234 U. S. 474.

They are forbidden to interfere with the foreign relations of the Union; and to coin money, and emit bills of credit. They can not grant titles of nobility, or establish a form of government which is not republican, or assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave, or pass a bill of attainder or *ex post facto* law, or deny or abridge the right of citizens of the United States to vote on account of race, color or previous condition of servitude, or abridge the privileges or immunities of citizens of the United States, or deny to the citizens of the other States the privileges and immunities which they allow to their own citizens, or authorize slavery or involuntary servitude except as a punishment for a crime after conviction, or deny any person within their jurisdiction the equal protection of their laws. They are compelled to respect contractual rights and all other rights to property. They can not make anything but gold and silver coin a tender in payment of debts, or pass any law impairing the obligation of contracts, or deprive any person of life, liberty or property without due process of law. They are directed to deliver fugitives from the justice of another State to the executive thereof upon his demand. Their courts are obliged to respect the public acts, records and judicial proceedings of the other States. 234 U. S. 475.

### Police Powers of the States

Mr. Bryce enumerates a few such powers as to different States:

I collect a few instances of recent legislation illustrating the tendency to extend State intervention and the scope of penal law:

New York provides that no guest shall be excluded from any hotel on account of race, creed, or color.

Wisconsin requires every hotel above a certain height to be furnished with fireproof staircases.

Michigan compels railroad companies to provide automatic car couplings, so that employees shall not need to go between the cars. Other States direct the use of certain kinds of brakes.

Georgia orders railway companies to put up a bulletin stating how much any train already half an hour late is overdue.

Massachusetts forbids the employment of color-blind persons on railroads, and provides for the examination of those so employed.

Several States order employers to find seats for women in shops, warehouses, or manufactories.

Massachusetts compels corporations to pay workmen weekly.

Maryland institutes a "State Board of Commissioners of Practical Plumbing," and confines the practice of that industry to persons licensed by the same.

Kansas punishes the making any misrepresentation to or deceiving any person in the sale of fruit or shade trees, shrubs or bulbs; and New Jersey does the like as regards fruit trees and briars.

Mississippi punishes with fine and imprisonment any legislative, executive, judicial, or ministerial officer, who shall travel on any railroad without paying absolutely, and without any evasion whatever, the same fare as is required of passengers generally.

Several States offer bounties on the raising of jute, flax, and hemp.

Texas makes it a punishable misdemeanor to deal in "futures" or "keep up any 'bucket shop' or other establishment where future contracts are bought or sold with no intention of an actual delivery of the article so bought or sold."

Georgia imposes on dealers in "futures," a tax of \$500 a year.

Michigan prescribes a system of minority voting at the election of directors of joint stock corporations.

Pennsylvania forbids the consolidation of telegraph companies.

Ohio punishes by fine and imprisonment the offering to sell "options," or exhibiting any quotation of the prices of "margins," "futures," or "options."

Colorado, Kansas, North Carolina, make the seduction under promise of marriage of any chaste woman a felony.

New York punishes with fine and imprisonment any person "who shall send a letter with intent to cause annoyance to any other person."

Illinois and Arizona forbid marriages between first cousins.

Nebraska prohibits the sale of tobacco to minors, and Iowa punishes the giving and selling of pistols to them.

Kentucky prohibits the sale of any book or periodical, "the chief feature of which is to record the commission of crimes, or display by cuts or illustrations of crimes committed, or the pictures of criminals, desperadoes, or fugitives from justice, or of men or women influenced by stimulants."

Massachusetts compels insurance companies to insure the lives of colored persons on the same terms with those of whites.

Minnesota enacts that all labor performed by contract upon a building shall be a first lien thereon; and declares that the fact that the person performing the labor was not enjoined from so doing shall be conclusive evidence of the contract.

Alabama makes it a punishable offense for a banker to discount at a higher rate than 8 per cent.

Many States have stringent usury laws.

Pennsylvania forbids a mortgagee to contract for the payment by the mortgagor of any taxes over and above the interest payable. *Bryce's American Commonwealth, Vol. II, 422-3.*

### **State and Federal Courts**

Federal Courts often administer laws of the State, when they acquire jurisdiction. They recognize and follow the statutes and common law of the States, in many matters, but decline in others. They adhere to the construction of State statutes, given by State courts, or as to what the State courts hold the common law of that State to be; but will not follow it as to general law, such as insurance and commercial law; nor do they follow such Courts as to Admiralty or Equitable practice. 105 U. S. 667; 113 U. S. 717; 107 U. S. 20. They decline, however, to follow a State statute which prohibits the Court from charging the jury upon the effect of the evidence. 91 U. S. 426; 133 U. S. 670.

### **Controversies Between the States**

The Supreme Court has jurisdiction as to some controversies between two or more States, but not as to all controversies. Federalist No. 80. It includes controversies as to boundaries. 12 Pet. 757; 7 How. 660; 17 How. 478; 23 How. 505; 11 Wall. 39; 158 U. S. 257. The jurisdiction does not extend to political controversies. 24 How. 66.

### **Controversies Between a State and Citizens of Other States**

As to history of provision, see Federalist No. 80; 2 Dall 419. The Eleventh Amendment was intended to remedy evils growing out of the construction of this clause. See 6 Wheaton 406; 117 U. S. 52; 123 U. S. 443; 134 U. S. 130; 135 U. S. 1-23; 107 U. S. 711; 114 U. S. 317.

A citizen can not sue his own State in a Federal Court. 134 U. S. 122.

As to suit by United States against a State, see 136 U. S. 211; 143 U. S. 21. An Indian tribe can not sue a State. 5 Pet. 1.

A State may sue a citizen of another State. 2 Tucker's Const. 788.

Evading the Eleventh Amendment by suing officers of the State. This subject has led to much controversy among the



judges and law writers. 2 Tucker's Const. 789; 9 Wheaton 738; 107 U. S. 711; 109 U. S. 446; 117 U. S. 52; 123 U. S. 443; 114 U. S. 270.

No suit against a State or its officers is allowed by the eleventh amendment to compel any affirmative action against the State or its officers. The State can not be so enforced; but where the State through its officers is taking affirmative action against a citizen, contrary to his constitutional right, he may either prevent it by injunction or redress it by an action against the officer, and, because the officer is without constitutional authority from the State to do the act, judgment will be allowed against the officer. 2 Tucker's Const. 791.

Can a citizen assign his claim to his own State, in order for it to sue another State? Can a foreign State sue a State of this Union? See 2 Tucker's Const. 792, 797.

Can jurisdiction be conferred on inferior courts as to Ambassadors, etc., or is that of the Supreme Court exclusive? See Tucker's Const. 798; Story Const. 1699; 2 Dale 297; 1 Cranch 137; 1 Wheaton 337; 111 U. S. 252, 449.

### **Powers of States to Regulate Suits in Own Courts**

The following is from decisions of Supreme Court:

It may be conceded in a general way that a State may restrict the right of a foreign corporation to sue in its courts. *Bank of Augusta v. Earle*, 13 Pet. 519, 589-591; *Angle American Provision Co. v. Davis Provision Co.*, 191 U. S. 373. And in the same general way it may be conceded that a State may restrict the right of such corporations to engage in business within its limits. *Paul v. Virginia*, 8 Wall. 168; *Hooper v. California*, 155 U. S. 648. But the power so to deal with these subjects, like all other state power, can only be exerted within the limitations which the Constitution of the United States places upon state action. *Missouri v. Lewis*, 101 U. S. 22, 30; *Blake v. McClung*, 172 U. S. 239, 256; *Chambers v. Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 148; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 33; *Southern Railway Co. v. Greene*, 216 U. S. 400, 413.

When a corporation goes into a State other than that of its origin to collect, according to the usual or prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legitimate purpose of such commerce, and the State can not, consistently with the limitation arising from the commerce clause, obstruct or hamper the attainment of that purpose. If it were otherwise, the purpose of the Constitution to secure and maintain the freedom of commerce by whomsoever conducted could be largely thwarted by the States and the commerce itself seriously crippled.

We are thus brought to the question whether the particular conditions imposed by this statute can be sustained when applied to rights of action like that disclosed in the present case. Without doubt a

foreign corporation seeking to enforce such a right in the courts of a State may be required to conform to the prevailing modes of proceeding in those courts and to submit to the usual rules respecting costs, the giving of security therefor (see *Blake v. McClung*, 172 U. S. 239, 256), and the like. 235 U. S. 203, 204.

The Supreme Court of the United States has jurisdiction to establish disputed boundary lines between States and it has exercised it in many cases. It would be of no benefit to give the cases or excerpts therefrom. Disputed boundary lines between States and nations has been a great source of war. Our constitution created a tribunal and gave it jurisdiction to settle peacefully and judicially such disputes, so far as the States are concerned.

### Division of One State Into Two and Adjustment of Debts

The Supreme Court has thus spoken on this subject :

The general rule stated in *Hartman v. Greenhow*, 102 U. S. 672, to the effect that where a State is divided into two or more States, in the adjustment of liabilities between each other, the debts of the parent State should be ratably apportioned among them, is essentially qualified by the authorities there quoted, in this, that a special agreement between the two States in respect of the assumption of a proportion of the debt as it existed before the separation, takes the case out of the general rule. 209 U. S. 528.

An agreement between States, such as this special agreement in respect to the proportion of the debt of Virginia which was to be assumed by the State of West Virginia, when consented to by Congress, binds the citizens of both States, and is irrevocable by either party. Where the legislature of either has attempted to impair the obligation of a compact, it has been held void under the Constitution of the United States. *Greene v. Biddle*, 8 Wheat. 1; *Rhode Island v. Massachusetts*, 12 Peters, 748, and cases cited. 209 U. S. 529.

On May 4, 1908, the Chief Justice announced the following decree in the suit between Virginia and West Virginia :

This cause having been heard upon the pleadings and accompanying exhibits, it is, on consideration, ordered that it be referred to a special master, to be hereinafter designated, to ascertain and report to the court:

1. The amount of the public debt of the Commonwealth of Virginia on the first day of January, 1861, stating specifically how and in what form the same was evidenced, by what authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidence of said indebtedness.

2. The extent and value of the territory of Virginia and of West Virginia June 20, 1863, and the population thereof, with and without slaves, separately.

3. All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted.

4. Such proportion of the ordinary expenses of the government of Virginia since any of said debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States.

5. And also on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia.

6. All moneys paid into the treasury of the Commonwealth from the counties included within the States of West Virginia during the period prior to the admission of the latter State into the Union.

7. The amount and value of all money, property, stocks and credits which West Virginia received from the Commonwealth of Virginia, not embraced in any of the preceding items and not including any property, stocks or credits which were obtained or acquired by the commonwealth after the date of the organization of the restored government of Virginia, together with the nature and description thereof. *209 U. S. 534, 535, 536.*

The special master reported and a final decree rendered and West Virginia acceded to the decree of the Supreme Court, and its legislature has provided for the payment and satisfaction of the judgment or decree rendered against it in favor of Virginia. Had it not voluntarily acceded and provided for a payment of the judgment, could it have been compelled by the Federal Government or by Virginia to perform the judgment and decree of the court? *Quere.*

### States as Parties to Suit

Since the adoption of the eleventh amendment, a state of the Union cannot be sued by any private person. But one state may sue another state, and a state, as plaintiff, may institute proceedings against an individual, and in these cases the supreme court of the United States has original jurisdiction. *Black on Constitutional Law, 143-4.*

### Actions Against States

In *Hans v. Louisiana* the general rule on this subject was concisely stated by Mr. Justice Bradley in the following terms: "To avoid misapprehension it may be proper to add that, although the obligations of a State rest for their performance upon its honor and good faith, and can not be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into court; yet where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contract, may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment." *Miller's Const. pp. 368-9.*

Referring to the history of the 11th amendment the opinion in 123 U. S. 443, Judge Campbell's brief in 108 U. S. 76, and 140 U. S. 1, we remark that the mandatory language of that amendment is emphatic. "The judicial power shall *not* be construed," etc. It is a constitutional rule of construction, to prevent by direct or indirect methods a suit against a state in a court of the United States.

The state need not be sued by name, to bring the case within the mandate of the amendment. See cases *supra*, and 9 Wheat. 738, 1 Pet. 110, 7 Pet. 627.

In 123 U. S. 443, and the other cases mentioned, it is settled that if the act of a state officer is contrary to the constitution of the United States, he cannot protect himself against suit, by a claim that he represents the state. But where an officer of the law does an act under valid and constitutional authority of the government of his state, in obedience to its order and in pursuance of his sworn duty as its officer, the act is not his own, it is the act of the state by its own will and mind and hand, the hand and will and mind of its own officer. If those by whom alone the state can act may be punished or prevented, it is folly to say the state is not punished and prevented. To enjoin the officers through whom only it can act is to enjoin the state; to sue these is to sue the state; . . . If these are deterred by such proceedings from acting, it is deterred from action; is a state maimed and helpless; a State only in name; a sovereign without will or capacity to act at all.

In 1 Pet. 110, 109 U. S. 446, and 107 U. S. 711, property held by state officers without right, and against the provisions of the constitution of the United States, was held to be beyond the reach of a federal court, because the officers held for the state, and to oust their possession would be to oust the possession of the State. This can not be done but by making the State a party, which the eleventh amendment forbids. *149 U. S. 176-7.*

Judge White in a dissenting opinion in *S. Dak. v. N. C.* 192 U. S. 339, said:

When 136 U. S. 211, and 134 U. S. 621, are considered, it seems to me clear that the decision now made not only is destructive of the inherent rights of the states as protected by the Eleventh Amendment, but also strips the government of the United States of its rights as a sovereign belonging to it under the Constitution. As under the decisions referred to a suit between the United States and a state is within the grant of judicial power over controversies between states, it must follow that a suit by a state against the United States is also of that character. Now, as the ruling is that such a controversy may include the claim of a private individual, if only such claim be transferred to a state, it follows that a suit by a state against the United States on a claim of that character is within the grant of judicial power. Thus it has come to pass that any and every claim against the United States, whatever be its character, is enforceable against the United States if only a state chooses to acquire and prosecute its enforcement. It is no answer to suggest that such claims of private individuals are not justifiable unless the law of the United States has caused them to be so, for if the constitutional grant of judicial power embraces such controversies as is now necessarily held, any restriction by Congress would be repugnant to the Constitution.



My reason does not perceive how the principles which have been stated and the rulings of this court enforcing them are rendered inapplicable by the suggestion that, as the court may not inquire into the motives actuating a particular transfer of right, therefore it is without power to refuse to enforce in behalf of South Dakota the alleged gift. This proceeds upon the assumption that the want of jurisdiction to enforce a private claim against a state depends upon motive. But the absence of such jurisdiction rests upon the constitutional prohibition which addresses itself to the very nature of the cause of action and imposes upon the court the duty to inquire into it. The power of the court when such is the case, even in a case brought in this court by one of the states of the Union to enforce an alleged pecuniary right, is aptly illustrated by 127 U. S. 265. There the state of Wisconsin, having obtained a judgment against the defendant corporation in the courts of Wisconsin, availed of the original jurisdiction of this court to sue the defendant corporation to enforce the judgement. It was held that, as the judgment was for a penalty imposed by the laws of Wisconsin, and as penalties had no extraterritorial operation, the court would look at the origin of the rights upon which the judgment was based, and, doing so, declined to enforce the judgment. See also 188 U. S. 14. If, as the result of merely a general rule of law against the extraterritorial operation of statutory penalties, this court looked beyond the judgment sued on by a state to the cause of action merged in the judgment, and refused relief, the court now must have the power to look into the present cause of action and the origin of the rights asserted by the state of South Dakota. To do otherwise seems to me is but to declare that a general principle of law restricting the extraterritorial enforcement of penal statutes must be held to have more sanctity than the declared will of the people of the United States expressed in the Eleventh Amendment.

### **Actions Against Agencies of States**

Reference is made, however, to *Kansas ex rel. Little v. University of Kansas*, and the note to 29 L. R. A. 378, where state colleges, prison boards, lunatic asylums and other public institutions have been held to be agents of the State not liable to suit unless expressly made so by statute.

But an examination of the cases cited, in any respect similar to this, will show that they involve questions of liability in a suit, rather than immunity from suit. Most of them were actions for torts committed, not by the public corporation itself, but by officers of the law. These public corporations were held free from liability in the suit, on the same ground that municipalities are held not to be responsible for the negligence of policemen, jailers, prison guards, firemen, and other agents performing governmental duties. *Workman v. Mayor of N. Y.*, 179 U. S. 556. 221 U. S. 646.

A suit against a bank was sustained even though the State held part of the stock, *Bank of U. S. v. Planters' Bank of Georgia*, 9 Wheat. 904. A tax collector was enjoined, where, under an unconstitutional law, he was about to sell the property of the taxpayer, *Poindexter v. Greenhow*, 114 U. S. 270. An attorney general was restrained from suing to recover penalties imposed by an unconstitutional statute, *Ex parte*

Young, 209 U. S. 123. Commissions have been enjoined from enforcing confiscatory rates, *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362; *Smyth v. Ames*, 169 U. S. 466; *Proutt v. Starr*, 188 U. S. 537. A state land commissioner was enjoined from proceeding, under an unconstitutional act, to cause irreparable damage to defendant's property rights, *Pennoyer v. McConnaughy*, 140 U. S. 1. Commissions have been restrained from enforcing a statute which illegally burdened interstate commerce, *McNeill v. Southern Ry.*, 202 U. S. 543; *Railroad Commission v. Illinois Central R. R.*, 203 U. S. 335.

Other cases might be cited which deny public boards, agents and officers immunity from suit. But the principle underlying the decision is the same. All recognize that the State, as a sovereign, is not subject to suit; that the State can not be enjoined; and that the State's officers, when sued, can not be restrained from enforcing the State's laws or be held liable for the consequences flowing from obedience to the State's command.

But a void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce unconstitutional statutes, or to justify under them, or to obtain immunity through them, fails in his defense and in his claim of exemption from suit. 221 U. S. 644.

If it were a suit directly against the State by name, it would be so palpably in violation of that Amendment that the court would probably be justified in dismissing it upon motion; but the suit is not against the State, but against Adams individually, and if the requisite diversity of citizenship exist, or if the case arise under the Constitution or laws of the United States, the question whether he is so identified with the State that he is exempt from prosecution, on account of the matters set up in the particular bill, are more properly the subject of demurrer or plea than of motion to dismiss. This seems to have been the opinion of Chief Justice Marshall in *Osborne v. Bank of the United States*, 9 Wheat. 738, 858, wherein he makes the following observations: "The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendant; whether they are to be considered as having a real interest, or as being only nominal parties." Again, 180 U. S. 38: "But where the suit is against an individual by name, and he desires to plead an exemption by reason of his representative character, he does not raise a question of jurisdiction in its proper sense. . . . But whether this is a question of jurisdiction or not, we think it should be raised either by demurrer to the bill or by other pleadings in the regular progress of the cause. Motions are generally appropriate only in the absence of remedies by regular pleadings and can not be made available to settle important questions of law." Cases were cited, and it was further observed that in *Fitts v. McGhee*, 172 U. S. 516, the question whether the officers proceeded against "were representatives of the State was disposed of upon answers filed." 209 U. S. 486.

"A State can only act or be proceeded against through its officers. If a decree could be entered against the State of Rhode Island enjoining prosecutions under this act, it could only operate against the

State through enjoining these defendants. An order restraining the Attorney General and his assistant from the enforcement of this statute is an order restraining the State itself. The present suit, therefore, is as much against the State of Rhode Island as if the State itself were named a party defendant." After referring to *In re Ayers*, and *Fitts v. McGhee*, and upon a review of the cases, the court proceeded: "The defendants Stearns and Greenough hold no special relation to the act of June 1, 1902. They are not specially charged with its execution. They are not thereby constituted a board or commission with administrative powers, nor are they as individuals, and apart from the official authority under which they act, threatening to seize the property of the complainant, or to commit any wrong or trespass against its personal or property rights. They have no other connection with this statute than the institution of formal judicial proceedings for its enforcement in the courts of the State in the name and behalf of the State. Upon reason and authority the present bill is a suit against the State of Rhode Island, within the meaning of the Eleventh Amendment to the Constitution of the United States." *119 Fed. Rep. 790-5; 209 U. S. 201.*

Harlan, J., dissenting in Young's case, said:

Upon the fullest consideration and after a careful examination of the authorities, my mind has been brought to the conclusion that no case heretofore determined by this court requires us to hold that the Federal Circuit Court had authority to forbid the Attorney General of Minnesota from representing the State in the mandamus suit in the state court, or to adjudge that he was in contempt and liable to be fined and imprisoned simply because of his having, as Attorney General, brought that suit for the State in one of its courts. On the contrary, my conviction is very strong that, if regard be had to former utterances of this court, the suit of Perkins and Shepard in the Federal court, in respect of the relief sought therein against Young, in his official capacity, as Attorney General of Minnesota, is to be deemed—under the *Ayers* and *Fitts* cases particularly—a suit against the State of which the Circuit Court of the United States could not take cognizance without violating the Eleventh Amendment of the Constitution. Even if it were held that suits to restrain the instituting of actions directly to recover the prescribed penalties would not be suits against the State, it would not follow that we should go further and hold that a proceeding under which the State was, in effect, denied access, by its Attorney General, to its own courts, would be consistent with the Eleventh Amendment. A different view means, as I think, that although the judicial power of the United States does not extend to any suit expressly brought against a State by a citizen of another State without its consent or to any suit the legal effect of which is to tie the hands of the State, although not formally named as a party, yet a Circuit Court of the United States, in a suit brought against the Attorney General of a State may, by orders directed specifically against that officer, control, entirely control, by indirection, the action of the State itself in judicial proceedings in its own courts involving the constitutional validity of its statutes. *209 U. S. 203.*

The plaintiff sued the Clemson Agricultural College of South Carolina, for damages to his farm, resulting from the College having built a dyke which forced the waters of the Seneca River across his land, whereby the soil had been washed away and the land ruined for agricultural purposes. There was no demurrer, but the defendant filed what was treated as a plea to the jurisdiction in which it averred that it owned no property, and had constructed the dyke as a public agent only, by authority of the State, on land belonging to the State. By stipulation the hearing was confined solely to the question of jurisdiction, and after considering the evidence the complaint was dismissed.

That ruling and the assignments of error thereon raise the question as to whether a public corporation can avail itself of the State's immunity from suit, in a proceeding against it for so managing the land of the State as to damage or take private property without due process of law.

With the exception named in the Constitution, every State has absolute immunity from suit. Without its consent it can not be sued in any court, by any person, for any cause of action whatever. And, looking through form to substance, the Eleventh Amendment had been held to apply, not only where the State is actually named as a party defendant on the record, but where the proceeding, though nominally against an officer, is really against the State, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer which seeks to compel him to exercise the State's power of taxation; or to pay out its money in his possession on the State's obligations; or to execute a contract, or to do any affirmative act which affects the State's political or property rights. 221 *U. S.* 641, 642.

But immunity from suit is a high attribute of sovereignty—a prerogative of the State itself—which can not be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the State's citizens. To grant them such immunity would be to create a privileged class free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law. Nor how “can the principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit penalties upon individual defendants. . . . whenever they interpose the shield of the State. . . . The whole frame and scheme of the political institutions of this country, State and Federal, protest” against extending to any agent the sovereign's exemption from legal process. *Poindexter v. Greenow*, 114 *U. S.* 270, 291.

The many claims of indemnity from suit have therefore been uniformly denied, where the action was brought for injuries done or threatened by public officers. If they were indeed agents, acting for the State, they—though not exempt from suit—could successfully defend by exhibiting the valid power of attorney or lawful authority under which they acted. *Cunningham v. Macon & Brunswick R. R.*, 109 *U. S.* 446, 452. But if it appeared that they proceeded under an unconstitutional statute their justification failed and their claim of immunity disappeared on the production of the void statute. Besides,



neither a State nor an individual can confer upon an agent authority to commit a tort so as to excuse the perpetrator. In such cases the law of agency has no application—the wrongdoer is treated as a principal and individually liable for the damages inflicted and subject to injunction against the commission of acts causing irreparable injury. 221 U. S. 642, 643.

### Actions Against State by United States.

The case, 143 U. S. 621, is in point, and upon many aspects of the question very suggestive. That was a suit brought by the United States against the state of Texas to determine the title to a tract, called the county of Greer, which was claimed by the state to be within its limits and a part of its territory, and by the United States to be outside the state of Texas and belonging to the United States. The jurisdiction of this court was challenged, but was sustained. After referring to the provisions of the Constitution and the judiciary act of 1789, Mr. Justice Harlan, speaking for the court, said: "The words in the Constitution, 'in all cases . . . in which a state shall be party, the Supreme Court shall have original jurisdiction,' necessarily refer to all cases mentioned in the preceding clause in which a state may be made, of right, a party defendant, or in which a state may, of right, be a party plaintiff. . . . It is, however, said that the last words quoted refer only to suits in which a state is a party, and in which, also, the opposite party is another state of the Union, or a foreign state. This can not be correct, for it must be conceded that a state can bring an original suit in this court against a citizen of another state. 127 U. S. 265, 287. Besides, unless a state is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court—especially if they be suits the correct decision of which depends upon the Constitution, laws or treaties of the United States—are to be excluded from its original jurisdiction as defined by the Constitution. That instrument extends the judicial power of the United States 'to all cases,' in law and equity, arising under the Constitution, laws and treaties of the United States, and to controversies in which the United States shall be a party, and confers upon this court original jurisdiction 'in all cases' 'in which a state shall be party,' that is, in all cases mentioned in the preceding clause in which a state may, of right, be made a party defendant, as well as in all cases in which a state may, of right, institute a suit in a court of the United States. The present case is of the former class. We can not assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more states of the Union, and between a state of the Union and foreign states, intended to exempt a state altogether from suit by the general government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the states." 185 U. S. 384-5.

### Actions by States.

In the capacity of *quasi*-sovereign the state has an interest independent of and behind the titles of its citizens, in all the earth and air

within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the state as a private owner is merely a makeweight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gulying of its roads.

The caution with which demands of this sort, on the part of a state, for relief from injuries analogous to torts, must be examined, is dwelt upon in 200 U. S. 496. But it is plain that some such demands must be recognized, if the grounds alleged are proved. When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in the Supreme Court. 180 U. S. 208.

Some peculiarities necessarily mark a suit of this kind. If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped. . . .

It was said by Judge Harlan that when the Constitution gave to this court original jurisdiction in cases "in which a state shall be a party," it was not intended to authorize the court to apply in its behalf, any principle or rule of equity that would not be applied, under the same facts, in suits wholly between private parties, and if under the evidence, a court of equity would not give the plaintiff an injunction, then it ought not to grant relief, under like circumstances, to the plaintiff, because it happens to be a state possessing some powers of sovereignty. 206 U. S. 237-8.

All the judges who took part in the decision in the Wheeling Bridge Case treated the suit as brought to protect the property of the State of Pennsylvania. Mr. Justice McLean, delivering the opinion of the majority of the court said: "In the present case, the State of Pennsylvania claims nothing connected with the exercise of its sovereignty. It asks from the court a protection of its property on the same ground and to the same extent as a corporation or individual may ask it." 13 How. 560-1. So Chief Justice Taney, who dissented from the judgment, said: "She proceeds, and is entitled to proceed, only for the private and particular injury to her property which this public nuisance has occasioned." 13 How. 589. And Mr. Justice Daniel, the other dissenting judge, took the same view. 13 How. 596.

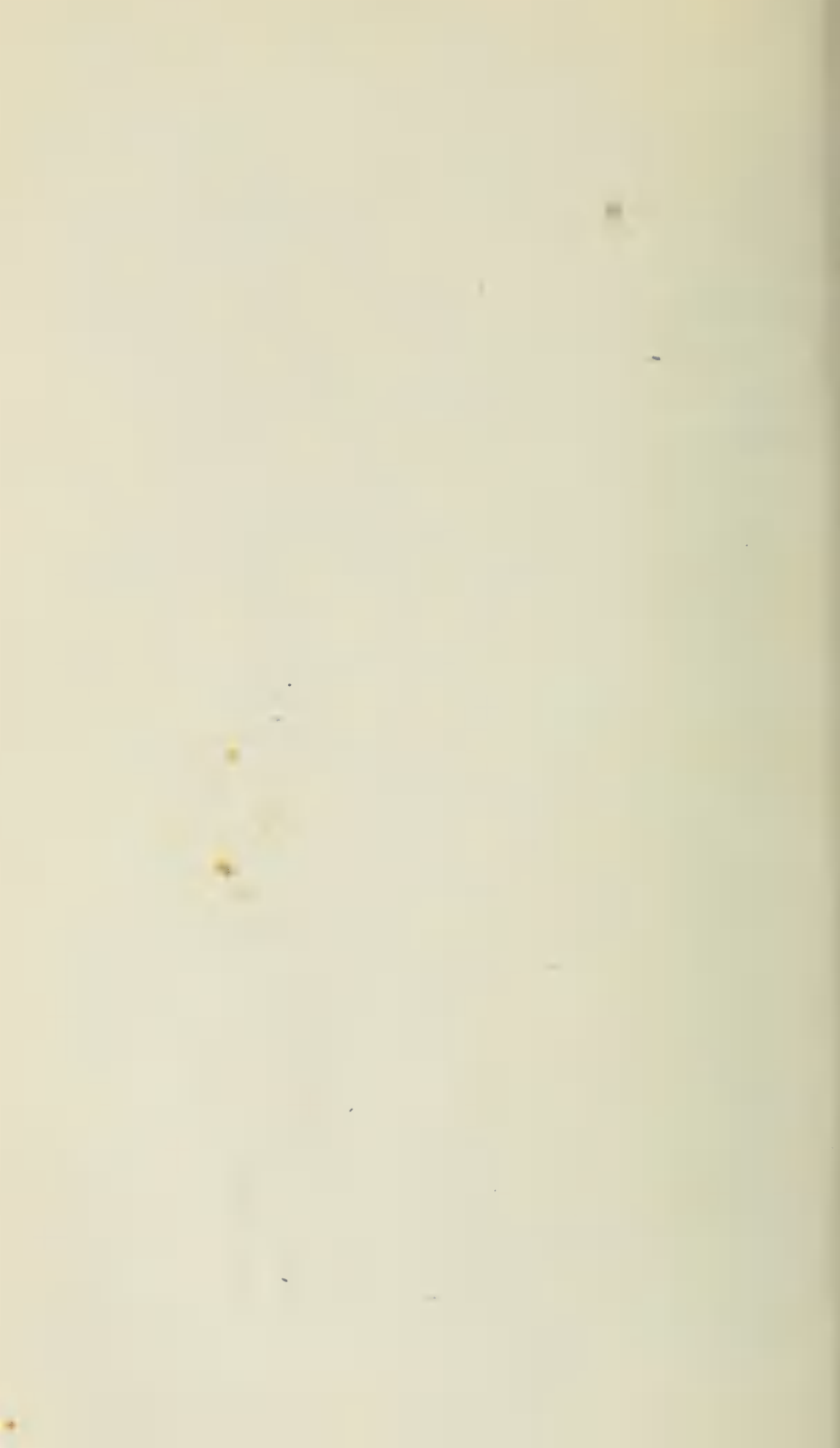
Mississippi v. Johnson, 4 Wall. 475, and Georgia v. Stanton, 6 Wall. 50, were cases of unsuccessful attempts by a state, by a bill in equity against the President or the Secretary of War, described as a citizen of another state, to induce this court to restrain the defendant from executing, in the course of his official duty, an act of Congress alleged to unconstitutionally affect the political rights of the state.

Texas v. White, 7 Wall. 700, Florida v. Anderson, 91 U. S. 667, and Alabama v. Burr, 115 U. S. 413, were suits to protect rights of property of the state. In Texas v. White, the bill was maintained to assert

the title of the State of Texas to bonds belonging to her, and held by the defendants, citizens of other states, under an unlawful negotiation and transfer of the bonds. In *Florida v. Anderson*, the suit concerned the title to a railroad, and was maintained because the State of Florida was the holder of bonds secured by a statutory lien upon the road, and had an interest in an internal improvement fund pledged to secure the payment of those bonds. In *Alabama v. Burr*, the object of the suit was to indemnify the State of Alabama against a pecuniary liability which she alleged that she had incurred by reason of fraudulent acts of the defendants; and upon the facts of the case the bill was not maintained.

In *Pennsylvania v. Quicksilver Co.*, 10 Wall. 533, an action brought in this court by the State of Pennsylvania was dismissed for want of jurisdiction, without considering the nature of the claim, because the record did not show that the defendant was a corporation created by another state.

In *Wisconsin v. Duluth*, 96 U. S. 379, the bill sought to restrain the improvement of a harbour on Lake Superior, according to a system adopted and put in execution under authority of Congress, and was for that reason dismissed, without considering the general question whether a state, in order to maintain a suit in this court, must have some proprietary interest that has been affected by the defendant. 127 U. S. 296-7.





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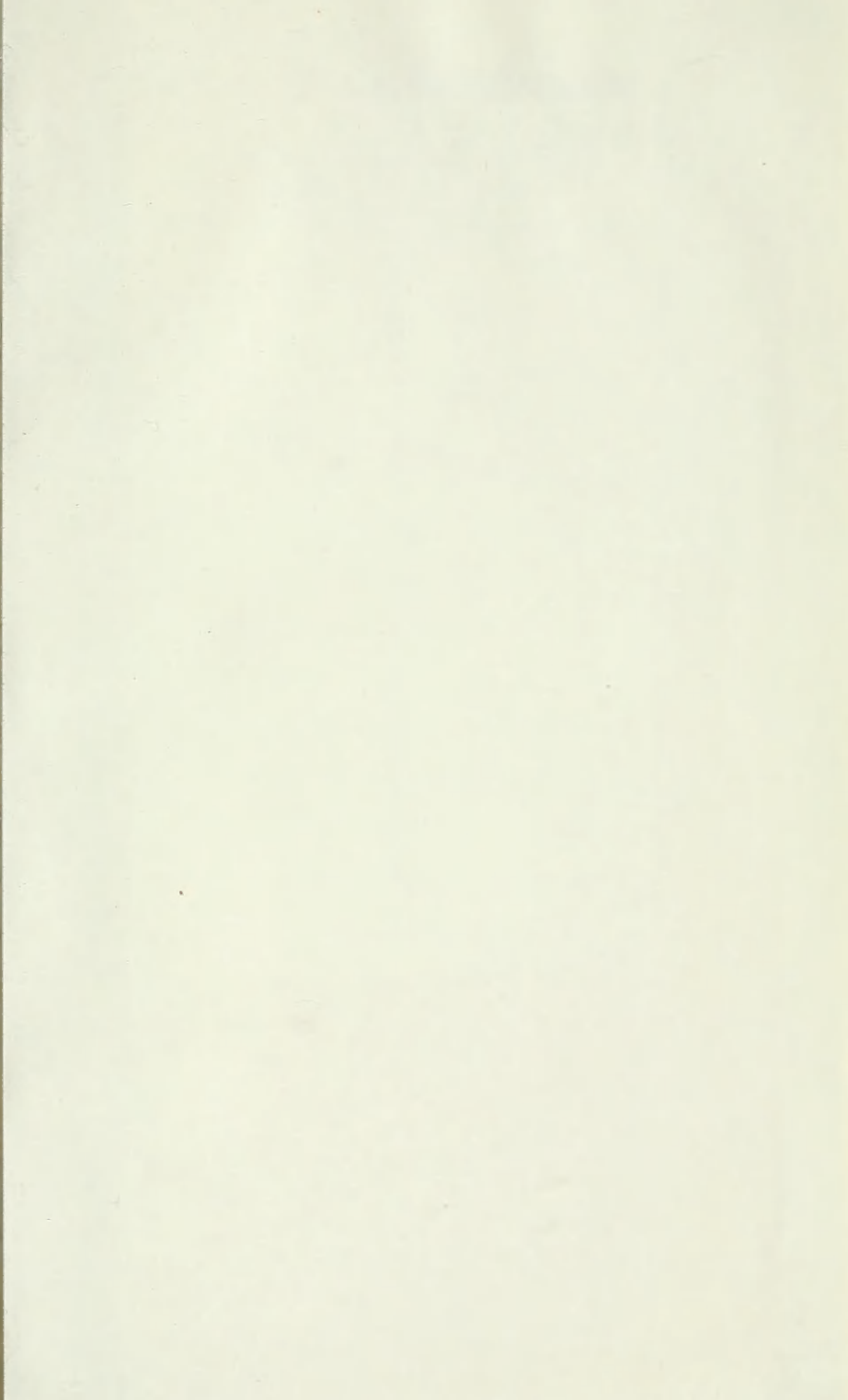
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